No. 585. October Term, 1897.

Brf. of Barnwell for Appt.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

Filed March 14, 1898.

THE LOUISVILLE & NASHVILLE R. R. CO. ET AL.

APPELLANTS,

vs.

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOURTH CIRCUIT.

MOTION TO VACATE SUPERSEDEAS.

BRIEF OF APPELLANT IN OPPOSITION.

JOSEPH W. BARNWELL,
Solicitor for South Carolina and Georgia Railroad Company, Appellant.

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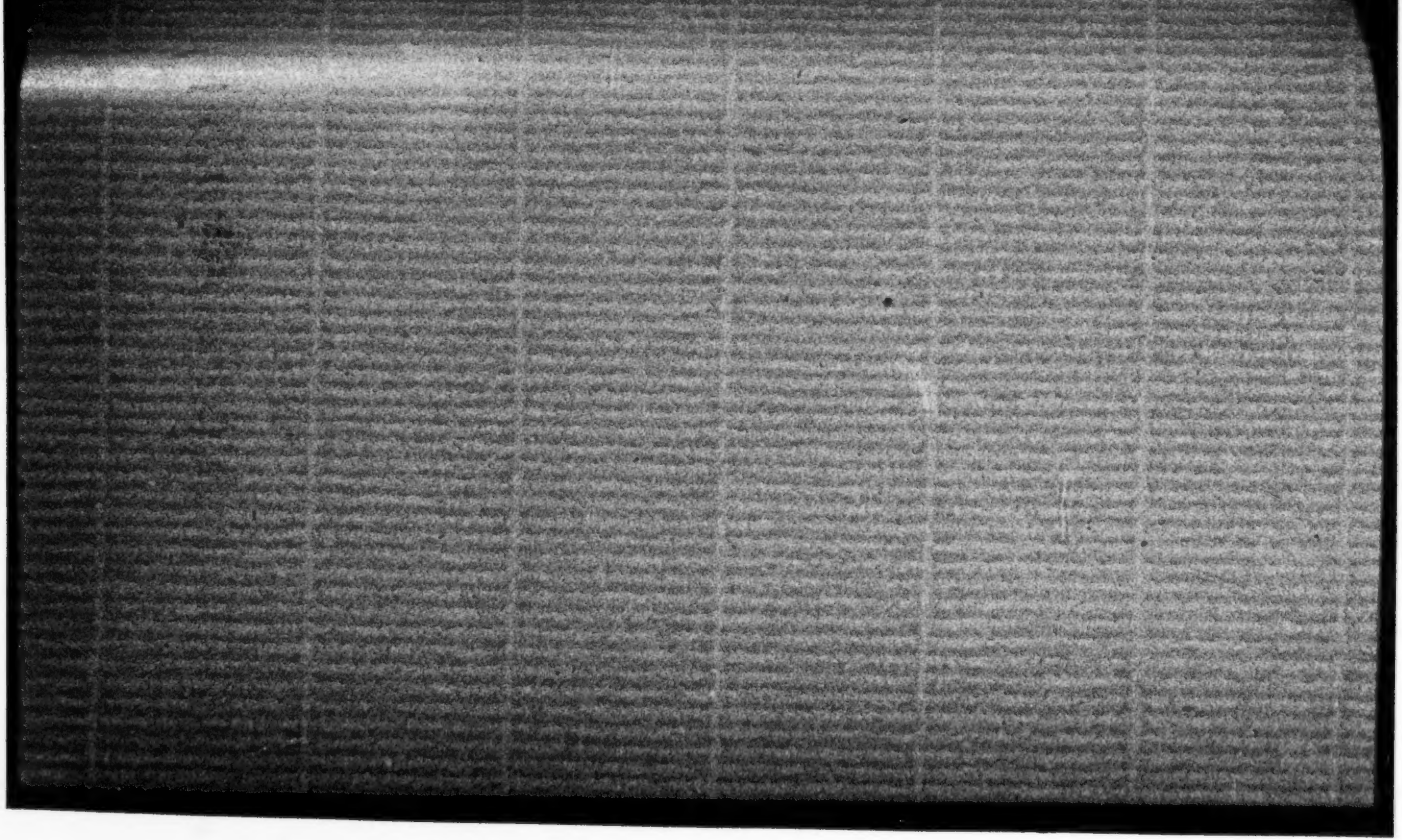

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THE LOUISVILLE & NASHVILLE R. R. CO. ET AL.,

APPELLANTS,

vs.

HENRY W. BEHLMER, APPELLEE.

APPEAL FROM THE CIRCUIT COURT OF APPEALS
FOURTH CIRCUIT.

MOTION TO VACATE SUPERSEDEAS.

BRIEF OF APPELLANT IN OPPOSITION.

STATEMENT.

On December 29th, 1892, the appellee, H. W. Behlmer, presented his petition to the Inter-State Commerce Commission complaining that the appellants, certain railroad companies doing a through business between Memphis, Tennessee, and Charleston, South Carolina, were, in violation of the fourth section of the Inter-State Commerce Act, (24 Stat. at Large, 379,) then transporting hay from Memphis to Charleston for a less rate than was charged from Memphis to Summerville, a town on the

same line of railroad, twenty-two miles nearer to Memphis than Charleston is.

The defence of the railroad companies was that Summerville is a small inland town with no competition whatever by water route, and only one railroad connection, while Charleston is possessed of eight all-rail routes and besides enjoys open water connection with North Atlantic ports, from which ports hay is directly imported to Charleston, and through which ports in connection with lake transportation hay is brought to Charleston from Chicago.

The Commission, following a series of decisions made by them, decided that they could not consider competition as affecting "the short and long haul" prohibition of Section 4 unless the competition was from precisely the same point of shipment to the point of longer destination, and that the "competition of other markets," which was the real defence of the railroads, could not be considered except under a special application to the Commission under the proviso of the fourth section, and the Commission thereupon directed the railroads to desist from charging more for the longer distance to Charleston than for the shorter distance to Summerville.

The railroads declining to obey the orders of the Commission, appellee, on the 2nd of November, 1894, filed his petition under the provisions of Section 16 of the Inter-State Commerce Act as amended by the Act of March 2nd, 1889, (25 Stat. at Large, 855,) in the Circuit Court of the United States for the District of South Carolina to enforce obedience to the orders of the Commission. A temporary injunction was issued by Judge Simonton, but dissolved on motion of the appellants on November 21st, 1894.

Upon the hearing on the merits, Judge Simonton differed from the Commission, and held that the competition of other markets could be considered, and did justify, under the facts proved, the railroads in charging less to Charleston where there was competition than to Summerville where there was none, and he dismissed appellee's petition by decree, filed Jan. 22nd, 1896. On April 7th, 1896, appellee

perfected an appeal to the Circuit Court of Appeals for the Fourth Circuit, and that Court, with strong dissent, reversed the Circuit Judge, the majority taking the view that the competition of other markets could not be considered except under special application to the Commission, and remanded on Nov. 3rd, 1897, the case to the Circuit Court, with direction to issue its orders to the railroads accordingly, and directing the payment of costs and counsel fees to appellee by the Railroad Companies.

Appellants then brought the case to this Court, obtaining an order from Judge Goff, one of the Justices who heard the case in the Court of Appeals, allowing the appeal, and giving the *supersedeas* bond required by him and serving the usual citation. The record has not yet been printed, but appellee has printed the opinion of the Circuit Court of Appeals together with his notice of motion, and Judge Simonton's opinion is for the convenience of the Court printed with this brief. (Appendix "A.")

The appellee now moves here to vacate the *supersedeas*, and failing an order to vacate, then that the Court declare that the filing of the appeal bond does not operate as a *supersedeas*.

ARGUMENT.

I.

PRELIMINARY.

In all the cases reported up to this time in which this Court has vacated a *supersedeas*, the objection has gone upon the ground of some delay or irregularity in the proceedings by which a *supersedeas* was obtained, and no case, it is submitted, can be found in which this Court has undertaken to decide on a motion to vacate, that in spite of the compliance with the Acts of Congress allowing a *supersedeas* on an appeal, yet no *supersedeas* was worked by reason of such compliance.

In the case of *ex-parte* French, (100 U. S., p. 1,) this Court decided that "if the writ is *informal* the remedy is by motion to vacate the writ and not by *mandamus* to have the judgment carried into execution." It would seem, therefore, that if the grant

ing of the appeal by the Circuit Court of Appeals and the filing of the bond and the issuing of the citation in this case did not operate as a *supersedeas*, the remedy of appellee, should be by moving in the Courts below, inasmuch as no order granted by them and no act performed by them need be set aside. In the case of *In Re.* Haberman Mfg. Co., (147 U S., p. 525,) a petition for *mandamus* was applied for in this Court, to compel the Circuit Court to grant a *supersedeas* on an appeal to the Circuit Court of Appeals from an injunction in a patent case, granted by the Circuit Court.

This Court refused the *mandamus* on the ground that under the seventh Section of the Judiciary Act of 1891, (26 Stat., 826,) discretion was allowed the Circuit Court to grant or refuse a *supersedeas* and this Court, therefore, could not control such discretion by *mandamus.* In that case the Court decided as to whether a *supersedeas* was operated by reason of the appeal, but the decision was not upon a motion to vacate, but upon petition for *mandamus.*

The motion here is merely that this Court construe the statute regulating appeals from the Circuit Courts in cases brought under the Inter-State Commerce Act, and not for a decision upon the informality of the appeal, which would be a mere question of the regularity of procedure and could be decided on motion from a simple inspection of the record.

II.

THE INTER-STATE COMMERCE LAW.

But conceding that the motion to vacate is the proper method of obtaining a construction of the Sixteenth Section of the Inter-State Commerce Act on the subject of the effect of an appeal (25 Stat. at Large 855,) it is submitted that the motion of appellee must be denied on a mere inspection of the terms of the Statute.

It is proper to say that this argument will proceed upon the theory that the provisions of the Inter-State Commerce Act forbidding a *supersedeas* in certain cases are not repealed by the Judiciary Act of 1891. It is not intended to concede that there

is no such repeal, but that ground has been specially and most effectively covered by counsel for the other appellants in opposition to this motion (Brief of Mr. Baxter, page 11) and it is not necessary to go over the argument here.

The clause of the Statute applying to appeals is as follows:

"When the subject in dispute shall be of the value of two "thousand dollars or more, either party to such proceeding "before said Court may appeal to the Supreme Court of the "United States under the same regulations now provided by law "in respect of security for such appeal, but such appeal shall not "operate to stay or supersede the order of the Court or the exe- "cution of any writ or process thereon. And such Court may in "every such matter order the payment of such costs and counsel "fees as shall be deemed reasonable."

The whole of Section 16 of the Act will be found printed as an appendix to this brief. (Appendix "B.")

III.

APPELLEE'S CONTENTION.

The contention of appellee is, that the words of the Statute forbidding an appeal to operate to stay or supersede an order or the execution of a writ or process of the trial Court apply also to the order, writs or process of the intermediate Court of Appeals.

IV.

THE OBJECT OF THE STATUTE.

1.

It is evident that the words of the Statute refer to the orders of the trial Court alone. At the time of the passage of the Statute, February 4th, 1887, and of the amendment of March 2nd, 1889, there were but two Courts to which the words of the Statute could in any way refer—the Circuit Court, which was the Court of first instance or trial Court and the Supreme Court, the Appellate Court; and accordingly the Statute speaks of only the orders of "said Court," that is, the Court in which the proceedings were begun and from which orders, writs and process would

proceed—and "the Supreme Court," the only Court of Appeals then in existence.

2.

It is well known that at the time of the passage of this Act and the amendments thereto, the dockets of this Court were so crowded as to render it almost impossible for a litigant to be heard in an ordinary appeal to this Court, except after the lapse of years. (McLish vs. Roff, 141 U. S. page 661.) In the meantime the abuses by carriers engaged in Inter-State Commerce, although rebuked by the trial Court would proceed in spite of the agreement both of the Inter-State Commerce Commission and the Circuit Court in condemning them.

It was harsh but possibly defensible legislation therefore to deny to the carriers who should be unsuccessful in maintaining the justice of their rates the right to suspend the orders of the trial Court pending an appeal. Such privilege, however, was permitted to all other litigants on the civil side of the Court, upon complying with the the terms of the Statute providing security against loss pending an examination of the decision of the trial Court in the only Court which then possessed the right of review.

But for the passage of the Judiciary Act of 1891 (26 Stat. 826,) the situation of appellee at present would be as follows: His bill would have been dismissed and his only appeal would have been directly to this Court.

And not until its judgment in revision of the decision of the trial Court could any order have been issued in the cause which appellee could desire to enforce, inasmuch as his bill had been dismissed.

IV.

THE JUDICIARY ACT OF 1891.

1.

It is not the purpose of appellant in this argument to discuss the question as to whether the *supersedeas* clause in the Inter-State Commerce Act applies to any appeal at all to the Circuit

Court of Appeals as distinguished from the "Supreme Court" for that view also has been effectively presented in the argument of counsel for the other appellants already refefred to, (Mr. Baxter's brief, 7); nor is it the purpose of this appellant to discuss the question as to whether *supersedeas* is prohibited in any case under the Inter-State Commerce Act unless the Commission and the lower Court agree, for that, too, has been discussed in the same brief, (page 7.) The case here will be treated as though the Act did apply to appeals to the Circuit Courts of Appeals, and as though any orders of the Trial Court which required execution were not stayed on appeal.

What, then, has been the effect of the passage of the Judiciary Act of 1891 upon appellee's rights? The object of this Act is thus described by this Court in the case of McLish vs. Roff, 141 U. S. 661, already cited:

"It is a matter of public history, and is manifest on the face "of that Act that its primary object was to facilitate the prompt "disposition of cases in the Supreme Court and to relieve it of "the enormous over-burden of suits and cases resulting from the "rapid growth of the country and the steady increase of its "litigation."

Accordingly the Judiciary Act, in the words of the Court in that case "provides for the distribution of the entire appellate "jurisdiction of our national judicial system between the Supreme "Court of the United States and the Circuit Court of Appeals "therein established by designating the classes of cases in respect "of which each of those Courts shall have final jurisdiction."

In the present case there is no doubt that the jurisdiction of the Circuit Court of Appeals is not final. (Inter-State Commerce Com., vs. Atchinson, 149 U. S. 264,) and appellee concedes (Appellee's brief, page 3,) that such is the case.

The cause is therefore not yet really decided, but is still under appeal to the Supreme Court.

The effect of the Judiciary Act of 1891 is simply to substitute two Courts of review in the place of one Court by inter-

posing the immediate Court of Appeals in such cases as the present, and when the Inter-State Commerce Act provides, supposing its *supersedeas* clauses to be operative, that "either party to a proceeding before the ~~Circuit~~ Court may appeal "to the Supreme Court," but "such appeal shall not operate to "stay or supersede the order of the Court," the result is, in such cases where there is a direct appeal under the Judiciary Act to the Supreme Court, that no order of the Circuit Court is suspended by such direct appeal. And in such cases as the present, where the decision of the Intermediate Court is not final, but appeal is taken from that Court to the Supreme Court, the order of the trial Court is still unsuspended by any appeal from its judgment, but it remains until ultimate decision by the Supreme Court of the United States.

2.

In the present case inasmuch as the bill was dismissed by the Trial Court, no order whatever was issued by the Court of first instance, but let us suppose that the decision of the trial Court had been in favor of the appellee and had directed the appellants to carry out the order of the Commission and to desist from enforcing the existing rates, and let us suppose that the railroad companies, the appellants here had appealed to the Circuit Court of Appeals. Grant for the sake of argument that such an appeal would not have stayed the order of the Circuit Court under the terms of the Judiciary Act of 1891, which substitutes the two Courts of intermediate and final resort for the Supreme Court; then also let it be granted that if the appellants here upon the decision of the Circuit Court of Appeals sustaining the Circuit Court, had appealed to this Court, then the perfection of such an appeal would also not stay the order of the Trial Court. Appellee, of course, would be satisfied with this. But, suppose, on the other hand, that the intermediate Court instead of sustaining the Trial Court in its orders had reversed the decision of the Circuit Court and directed the dismissal of the bill and the setting aside of the order enforcing the command of the Inter-State Commerce Commission. If the contention of appellee on this motion is correct, this would be an order of the Circuit Court of Appeals, which was not stayed or superseded by the

appeal to this Court, and the mandate of the Circuit Court of Appeals would issue to the Circuit Court directing the dismissal of the bill in spite of the perfection of an appeal to this Court.

The orders of the two Courts being inconsistent, and neither being superseded, it is to be presumed that the order of the higher Court is that which would be carried out, and appellee would obtain the very reverse of his wishes.

3.

APPELLANT'S VIEW.

The view of appellant, on the other hand, if its construction is correct, would present no such inconsistencies. By following the plain words of the Statute, supposing it unrepealed, and to apply to any case, it is manifest that they apply to the orders of the Circuit Court, and its decision, order, writs or process stand unaffected by appeals to this Court direct or to this Court in last resort by appeal from the Intermediate Court. From the allowance of an appeal by the Circuit Court until the case is disposed of here, there is only one appeal, and that appeal is equivalent to and in place of the "appeal to the Supreme Court" allowed by the Inter-State Commerce Act prior to the reorganization of the judiciary system under the Act of 1891.

V.

THE MANDATE OF THIS COURT.

The provisions of the Act of 1891 as to the remanding of cases on appeal conclusively sustain the view that when a case once reaches this Court by way of the Circuit Court of Appeals, whether by appeal, or writ of error, or by *certiorari* from this Court to the Circuit Court of Appeals, it is in effect an appeal from the Circuit Court, for under Section 10 of that Act the case is remanded, not to the Intermediate Court, but to the Court of first instance or Trial Court. Section 10 reads as follows:

"Section 10. That whenever on appeal, or writ of error or "otherwise a case coming directly from the District Court or "existing Circuit Court shall be reviewed and determined in the "Supreme Court, the cause shall be remanded to the proper "District or Circuit Court for further proceedings to be taken "in pursuance of such determination.

"And whenever on appeal or writ of error or otherwise a case "coming from a Circuit Court of Appeals shall be reviewed and "determined in the Supreme Court, the cause shall be remanded "by the Supreme Court to the proper District or Circuit Court "for further proceedings in pursuance of such determination."

It will be seen that precisely the same course is required in cases brought directly here as in cases coming here by way of the Circuit Court of Appeals. The Intermediate Court is for all purposes affecting the final judgment non-existent when the case properly reaches this Court. It is only in cases in which the decision of the Circuit Court of Appeals is final, and where this Court does not bring up the case by *certiorari* that the Circuit Court of Appeals issues its mandate to the Court in which trial took place.

The provision as to such cases is as follows:

Section 10. * * * * "Whenever on appeal or writ of error "or otherwise a case coming from a District or Circuit Court shall "be reviewed and determined in the Circuit Court of Appeals in "a case in which the decision in the Circuit Court of Appeals is "final, such cause shall be remanded to the said District or Cir- "cuit Court for further proceedings to be there taken in pur- "suance of such determination."

VI.

INTERMEDIATE COURTS OF APPEAL.

Although the judicial system of the United States has always provided for intermediate Courts of Appeal in certain cases, yet no decisions can be found in the books which assist in the decision of the question raised here, and the introduction of intermediate Courts

in certain States has been too recent to allow of many decisions upon the subject in their Courts. The two leading text books on appeals, "Powell on Appellate Proceedings," and "Elliott's Appellate Procedure," do not treat of intermediate appellate Courts at all, and only the latest digests treat of the subject under a separate head.

Under the Judiciary Act of 1789, (Section 21—1 Stat. at L 83.) an appeal was allowed from the District to the Circuit Court in common law, and equity and admiralty cases and an appeal from the Circuit Court to this Court, in all cases except cases at law.

U. S. vs. Goodwin, 7 Cranch 108. Wiscart vs. Dauchy, 3 Dallas 321. Sarchet vs. U. S. 12 Peters, 143.

After the abolition of the equity and common law jurisdiction in civil cases of the District Court, the jurisdiction of the Circuit Court as an intermediate Court of Appeal from the District Court was preserved in admiralty cases, up to the time of the Judiciary Act of 1891. As appeals in admiralty, however, are trials *de novo* and absolutely extinguish the decree below pending appeal, it is not surprising that there should be no decisions in the reports of this Court, which throw light upon the present question.

Yeaton vs. U. S. 5 Cranch 281.
The Lucille, 19 Wallace 73.

Again under the Bankrupt Act of 1867, (14 Stat. at L. 518). an appeal was allowed from the decisions of the District Court to the Circuit Court in certain cases at law and in equity and an appeal from the Circuit Court to this Court, but the Act was of short duration and the appeals were few in number, and the right of appeal given to this Court under Section 9 of that Act was different in its nature from the jurisdiction now exercised by this Court over appeals from the Circuit Court passing by way of the Circuit Court of Appeals. Owing to the fact that the Supreme Court possessed, under the Bankrupt Act of 1867, no power to issue its mandate to the District or Trial Court, but was compelled to deal directly with the

Circuit Court, as though the case had arisen in that Court, the supervising jurisdiction of this Court was less direct and narrower than the appellate jurisdiction of the Supreme Court provided under the Act of 1891.

Stickney vs. Wilt, 23 Wallace, 150.

VII.

STAY OF PROCEEDINGS.

From the terms of Section 16 of the Inter-State Commerce Act, under consideration here, it will be seen that the words used are "stayed or superseded," and the Section also speaks of "any orders," "any writs or process." It would seem that these words were specially intended to cover all equity cases.

The present case is in the nature of a suit in equity, and it would seem that the rules prevailing in Courts of Equity would properly be considered in interpreting the words of the Section under consideration.

In the English practice, a stay of proceedings in equity anciently was operated by mere appeal to the House of Lords, and was subsequently in practice, obtained in the lower Court, as that was the Court which dealt directly with the property and the parties. The latter was the general rule in other jurisdictions in which an appeal did not suspend a decree.

Willan vs. Willan, 16 Vesey, 216.
Ticey vs. Coxe, 3 Madd, 278.
Green vs. Winter, 1 Johnson's Chancery, 80.
Pell vs. Ball, 1 Rich., Equity, 351.
Hovey vs. McDonald, 109 U. S., 150.
Kitchen vs. Randolf, 93 U. S., 88.

This Court, in the Slaughter House cases, 10 Wall., 273, recognized clearly the distinction between appeals in equity and a stay of proceedings thereon, and writs of error working a *supersedeas.*

It would seem, therefore, that the stay, if any, of orders, independently of the other words of the statute, should be the stay

of orders in the trial Court and not in the Circuit Court of Appeals.

VIII.

THE OPERATION OF THE JUDICIARY ACT.

Appellant has endeavored in a former part of this brief to show the reason for the adoption of legislation so harsh as that denying to litigants the right to suspend an order of the Trial Court.

Certainly no such condition of affairs now prevails as would induce this Court, unless plainly required to do so by the words of the statute, to extend these harsh provisions to appeals from the Circuit Court of Appeals, for the mischief is now remedied and appeals are heard without serious delay of which complaint could properly be made.

And it is submitted without going into the merits of the appeal that the present case illustrates particularly the harshness of the provisions of the Inter-State Commerce Act with regard to the denial of *supersedeas*; for if denied here the result would be that the decision of the Circuit Court, which appellant contends is in direct accord with the decision of this Court made at the present term in the case of Inter-State Commerce Commission vs. Alabama Midland Railway Co., (168 U. S. 144,) would be set aside pending this appeal, and the decision of the Circuit Court of Appeals founded upon the view now, it is submitted, over ruled that the competition of other markets does not create "the dissimilar circumstances and conditions" under which the carrier may discriminate—would prevail.

IX.

APPELLEE'S BRIEF.

1

With regard to so much of appellee's brief as contends that the provisions of the Inter-State Commerce Act still forbid an appeal to operate as a *supersedeas*, (Appellee's brief, 2 to 4 in-

clusive,) this appellant adopts the brief of counsel for the other appellants already referred to.

2.

With regard to so much of appellee's brief as seeks to show that the words of the Inter-State Commerce Act apply to appeals from the Circuit Courts of Appeals to this Court, it is submitted that it confuses an appeal from the Circuit Court of Appeals to the Supreme Court with an appeal from the Circuit Court. Here are the appellee's words: (Brief 7,)

"It only remains to inquire what provisions for bonds or "other securities were of force at the time of the adoption of "the Act of 1891. At that time as we have seen Section 16 of "the Act to regulate commerce read and still reads that an appeal "might be taken to the Supreme Court 'under the same regula-"tions now provided by law in respect to security for such "appeals. But such appeal shall not operate to stay or supersede "the order of the Court or the execution of any writ of process "thereon.'"

Appellee simply begins his quotation from the Inter-State Commerce Act at a point in the clause subsequent to the declaration that the appeals referred to were appeals from "the said Court," that is to say, the Circuit or Trial Court, and granting that there is no repeal of the *supersedeas* provisions of the Inter-State Commerce Act, the Trial Court does not mean the Intermediate Court, as appellant has endeavored in this argument to show.

It is respectfully submitted, therefore, that appellee's motion should be denied.

JOSEPH W. BARNWELL,
Solicitor for the South Carolina and Georgia Railroad Company, Appellant.

APPENDIX "A."

JUDGE SIMONTON'S DECISION.

THE UNITED STATES OF AMERICA,
DISTRICT OF SOUTH CAROLINA.

In the Circuit Court—Fourth Circuit. In Equity.

H. W. Behlmer

vs.

The Louisville and Nashville Railroad, *et al.*

This is a proceeding in Equity brought to enforce a finding of the Inter-State Commerce Commission, under Section 5, of the Act to amend an Act to Regulate Commerce, approved March 2nd, 1889, (25 Statutes at Large 855.) This Section 5 amends Section 16 of the Amended Act which was approved 4th February, 1887, (24 Statutes at Large 379.)

The petitioner is a resident of Summerville, an incorporated town on the line of the South Carolina Railway Company, about twenty-two miles from Charleston, South Carolina.

He complained that he had been compelled to pay upon a shipment of two carloads of hay, from Memphis to Summerville, twenty-eight cents per hundred, whilst the through freight charge from Memphis to Charleston is but nineteen cents per hundred. He charged that this was in violation of Section 4 of the Act of 1887, the long and short haul clause. The Commission heard the case on the petition and answers, decided in favor of the petitioner and ordered the South Carolina Railway Company, then, and at the date of filing the petition, in the hands of a Receiver, to reduce the rate from Memphis to Summerville to 19 cents. The defendant the South Carolina Railway Company, by its Receiver, has not obeyed the order.

The facts of the case are, the two carloads of hay were shipped from Memphis, Tennessee, to Chattanooga, Tennessee; 310 miles over the Memphis and Charleston Railroad from Chattanooga to

Atlanta, Ga., 152 miles over the East Tennessee, Virginia and Georgia Railroad; from Atlanta to Augusta, Georgia, 171 miles over the Georgia Railroad; and from Augusta, Georgia, to Summerville, South Carolina, 115 miles. The through freight charge from Memphis to Charleston is 19 cents. In addition to this, the petitioner paid nine cents. In the through freight charge of 19 cents all these railroads participate. None of them but the South Carolina Railway had any interest in the nine cents. This is the rate of freight from Charleston to Summerville, approved by the Railroad Commissioners of South Carolina. All the railroads named are parties defendant. At the date of the transaction complained of, 17th August, 1892, the South Carolina Railway Company was in the hands of D. H. Chamberlain, Receiver; the railway property was sold under foreclosure of mortgage in the proceedings in which he was appointed Receiver, by D. H. Chamberlain as Special Master, he having been thereunto named. The sale was confirmed 24th April, 1894, the terms of sale complied with, the deed of conveyance executed shortly thereafter, to wit: 1st May, 1894, and the purchasers were put into possession, and afterward, the South Carolina and Georgia Railroad Company, under purchase from and conveyance by them, was put into absolute possession on 1st July, 1894. The cause was heard before the Commission. Its decision was rendered 27th June, 1894. It was served on D. H. Chamberlain, Receiver, some time in July, 1894. There is no evidence of any notice to or service on, or refusal or neglect to obey the order on the part of the South Carolina and Georgia Railroad Company, styled in these proceedings, the successor, assignee and purchaser of the South Carolina Railway Company, and its Receiver, Daniel H. Chamberlain.

At the threshold of the case, is a motion to dismiss these proceedings against the South Carolina and Georgia Railroad Company, for the want of this evidence above stated. As the testimony taken in the cause develops, and it is not disputed, the other roads made defendants, had no contract or agreement for through rates from Memphis to Summerville. The rate was to Charleston, a competitive point. Nor did any of the roads other than the South Carolina RailwayCompany share in the nine cents, over the nineteen cents per cwt. This excess went to the South Carolina Railway alone. This preliminary objection therefore is vital.

It is very clear that the South Carolina and Georgia Railroad Company did not become liable in these proceedings against the Receiver of the South Carolina Railway merely because it was the alienee of the purchaser at the foreclosure sale, or even were it the purchaser itself. (Sullivan vs. Portland, &c., R. R. Co., 94 U. S. at page 610. Hoard vs. Chesapeake and Ohio R. R. Co., 123 U. S. 222.) If it is so liable, the liability must arise from the terms of sale under which the purchase was made.

The petitioner relies upon the terms of the order of sale in the decree of foreclosure of the South Carolina Railway Company, which are in these words:

"The purchaser or purchasers at said sale shall as part of the consideration and purchase price of the property purchased, take said property upon the express condition, that he or they or their assigns will pay, satisfy and discharge any unpaid compensation allowed to the Receiver and all claims made against said Receiver and all obligations contracted and obligations incurred by the Receiver which may be contracted or incurred by the Receiver prior to the delivery of the possession of the property sold to the purchaser or purchasers and which shall not have been paid by the Receiver prior to such delivery of possession out of the income of the mortgaged property."

The language of this part of the decree clearly refers to pecuniary obligations. The purchasers are to pay, satisfy and discharge any unpaid compensation, all claims made against the Receiver and all obligations of the Receiver which shall not have been paid, &c.

The fifth section of the amended Act (1889) amended Section 16 of the amended Act (1887) imposes no punishment, pecuniary or otherwise, for disobeying the order of the Commission. It does inflict a fine upon the offending party if it disobey the order of the Circuit Court of the United States, if the Commission appeal to such Court for assistance, and that Court issue its injunction or other process commanding disobedience to the order of the Commission to cease. But in such case the punishment is in the nature of a contempt proceeding and the party

must be punished for his own act. It cannot be presumed that the South Carolina and Georgia have the same rates as the Receiver had when he controlled the property. We cannot presume that this new company, wholly disconnected with the Receiver, had adopted all his alienees. *Non constat* that it would disobey the Commission if it were served with an order from it. Clearly the refusal of the Receiver made nearly two months after the property had been conveyed, and nearly one month after the South Carolina and Georgia Railroad Company were in exclusive possession, in their own right, cannot bind that Company.

The petition in this Court avers "that the findings and conclusions of the Commission in this case, together with a copy of the order and notice, were delivered to each and all of the parties to the cause, their Receivers and successors in operation."

On this averment it bases its prayer for temporary and permanent injunction against the South Carolina and Georgia Railroad Company, as successors in operation of the Receiver. The evidence fails to establish this most material averment. So far as the South Carolina and Georgia Railroad is concerned, and as to the South Carolina and Georgia Railroad Company, the prayer of the petition is *coram non judice*. The only ground of jurisdiction against the South Carolina and Georgia Railroad Company is that having been served with copy of the order of the Commission it refused or neglected to obey it. The record discloses no such service, refusal or neglect.

But besides the South Carolina and Georgia Railroad Company there are other defendants. They have answered and have met the issue presented by the petition. The questions made are of deep interest and require solution.

The answer in which all the defendants join, except the South Carolina and Georgia Railroad Company, admits the hearing before the Commission and the result, denies as well that it had the effect of a judicial decision, as its correctness in law or fact. It admits that the joint rate agreed upon between the defendants for hay, from Memphis to Charleston is 19 cents per cwt., but

it denies that there is anything more than an arrangement between independent companies, each of which has a specified and distinct interest in this rate. It denies that there is any agreement for a through rate to Summerville, South Carolina, from Memphis. It avers that this rate of 19 cents per cwt. is reasonable. That it is the result not only of competition between the roads charging it, but of competition at Charleston with other all railroad routes, with rail and water transportation, and with all water transportation. That the rate on hay to Summerville is made up of this 19 cents per cwt through charge, which alone is divided between the defendants in definite proportions, and of nine cents per cwt. charged as a local rate on the South Carolina Railroad between Charleston and Summerville. That the through rate greatly exceeds what the aggregate of local rates would be, and that the local rate of nine cents has the approval of the Railroad Commission of South Carolina, and that it is reasonable.

The controlling question in this case is: Have these defendants violated the provisions of the 4th Section of the Act of Congress, approved 4th February, 1887. "An Act to Regulate Commerce, 24 Statutes, 379. Section 4: That it shall be unlawful for any common carrier, subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property under substantially similar circumstances and conditions for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge and receive as great compensation for a shorter as for a longer distance.

Provided, however, that upon application to the Commission appointed under the provisions of this Act, such common carrier may in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property. And the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from operation of this section of this Act."

The defendants did not avail themselves of this proviso, notwithstanding that the Commission opened the door for them to do so. So the question in this case is. Was this charge of 28 cents per hundred from Memphis to Summerville made by these defendants. and was it made under substantially similar circumstances and conditions as the charge of 19 cents per hundred from Memphis to Charleston; the distance from Memphis to Summerville being shorter than the distance from Memphis to Charleston, both Summerville and Charleston being on the same line and in the same direction?

It would appear from the evidence in this case that these defendants had no common controlling head, that they were independent of each other, and that acting independently they had so arranged their charges of freight on hay and articles of this character, that 19 cents per hundred would be divided between them for transportation between Memphis and Charleston. They had similar contracts from Memphis to Chattanooga, to Atlanta to Augusta. But these contracts did not include any intermediate points. In the case at bar all that was received by all these connecting roads was 19 cents per hundred. The South Carolina Railway Company shared in this. In addition that this Railway Company charged nine cents because the shipment was to Summerville, and this nine cents it shared with no one. Strictly speaking, therefore, the defendants did not charge for anything but transportation between Memphis and Charleston. There was no arrangement between them for any other through rate to any point in South Carolina than Charleston, and no authority in any one to change or enlarge the terms of the contract. Certainly the shipping agent in Memphis could not do it. He may very well have said to one who desired to ship hay into South Carolina, and who wished to avoid the local rates on each road, I can do this for you, we have through rates to competitive points, I can give you the benefit of the through rate to Augusta, or I can give you the through rate to Charleston. My authority goes no further. I can put your freight within reach of you on the South Carolina Railway, and can bind this road only as to the rate to Charleston. When you get it there you may contract with the South Carolina Railway Company. The South Carolina Railway Company itself could say to its contracting roads, we are

perfectly willing to contract with you for a through rate to Charleston. There we meet competitive carriers and competing markets, and if we do not meet you in lowering the through rates you, and we as well, will lose business. But we will not agree to through rates to points where we have no competition and especially to points on our road. Freight to these points and charges for transportation are our own business, and no one else is concerned in it. The mandate of the commission, therefore, to these defendants, other than the South Carolina Railway Company, directs them to do that which it is out of their power to do, and is nugatory and void.

But if we assume, for the sake of argument, that all the defendants are affected by this charge, does it violate the 4th Section of the Act above quoted?

Judge Cooley, *in re* L. & N. R. R. Co. 1 I. C. C. Reports 57, says: "The charging or receiving greater compensation for the shorter than for the longer haul is sure to be forbidden only where both are under substantially the same circumstances and conditions. And therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its so doing will not alone convict it of illegality, since if the circumstances and conditions of the two hauls are dissimilar the Statute is not violated." This is quoted with approbation by the United States Circuit Court, Southern District California. Inter-State Commerce Commission vs. A. F. & S. F. R. Co., 50 Fed. Rep., 295.

When, then, may the circumstances and conditions of the two hauls be said to be dissimilar? Judge Cooley in the same case answers this question. "Among other things in cases where the circumstances and condition of the traffic were affected by the element of competition and where exceptions might be a necessity if the competition were to continue. And water competition was beyond doubt, especially in view." In the case from 50 Fed. Rep. above cited, this is one of the Rubrics: "Los Angeles, California, is a point to which there is active competition in certain kinds of freight between several transcontinental railway lines, direct or by water via Vancouver and San Francisco, also by ocean freights via Aspinwall and the Straits of Magellan, from points east of

the Missouri River, and a through rate on the same kind of freight, lower than to San Bernandino, an intermediate non-competitive point 60 miles from Los Angeles, on one of the competing railroad lines is not prohibited by the Act, since the circumstances and conditions were substantially dissimilar."

The circumstances of the case at bar are closely like those of the case just quoted. Charleston is a competitive point between all railroad routes, all railroad routes partly by rail and partly by water, and routes all water. If the defendants had not consented with each other to lower the rate, no hay whatever would come from the hay producing territory tributory to Memphis, and all the Southeast Atlantic States would be compelled to rely on other portions of the West, North or Northeast for hay.

The evidence clearly shows that the rate to Charleston was forced down by this competition. But this is an advantage to all the territory tributory to Charleston, and all stations share in it. No such competition exists at Summerville, a small inland town. If it and others like it were permitted to share in the circumstances and conditions surrounding Charleston and to get the benefit of the competition which Charleston enjoys, and they have not, then *ex-necessitate* the South Carolina Railway will be called upon to elect between its through business and its local business, and in this election to give up the former. Thus all stations on the line of road will pay local freight on hay, and the market to the extent of imports from Memphis will be destroyed. The Inter State Commerce law was intended to promote trade. Such a construction as is now sought would destroy competition, the life of trade.

The bill is dismissed.

CHARLES H. SIMONTON,

22nd January, 1896. *Circuit Judge.*

APPENDIX "B,"

An Act to amend an Act to Regulate Commerce. Approved March 2d, 1889. 25 Stat. at Large, 855.

"SECTION 5. That Section 16 of said Act is hereby amended so as to read as follows: That whenever any common carrier, as defined in and subject to the provisions of this Act, shall violate, or refuse or neglect to obey or perform any lawful order or requirement of the Commission created by this Act, not founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, it shall be lawful for the Commission or for any company or person interested in such order or requirement, to apply in a summary way, by petition to the Circuit Court of the United States sitting in Equity, in the Judicial District in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be.

And the said Court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the Court shall deem reasonable; and such notice may be served on such common carrier, his or its officers, agents, or servants in such manner as the Court shall direct.

And said Court shall proceed to hear and determine the matter speedily as a Court of Equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such Court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the Court may think needful to enable it to form a just judgment in the matter of such petition.

And on such hearing the findings of fact in the report of said Commission shall be prima facie evidence of the matters therein stated; and if it be made to appear to such Court, on such hearing, or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such

Court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same.

And in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such Courts to issue writs of attachment, or any other process of said Court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, Receiver or other person failing to obey such writ of injunction, or other proper process, mandatory or otherwise, and said Court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory, or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day, after a day to be named in the order, that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the Court shall direct, either to the party complaining or into Court, to abide the ultimate decision of the Court, or into the Treasury, and payment thereof may, without prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in *personam* in such Court.

When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said Court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the Court or the execution of any writ or process thereon, and such Court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable.

Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the Courts of the United States.

"If the matters involved in any such order or requirement of said Commission are founded upon a controversy requiring a trial by jury, as provided by the seventh amendment to the Constitution of the United States, and any such common carrier shall violate or refuse or neglect to obey or perform the same, after notice given by said Commission as provided in the fifteenth Section of this Act, it shall be lawful for any company or person interested in such order or requirement to apply in a summary way by petition to the Circuit Court of the United States sitting as a Court of law in the judicial district in which the carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience as the case may be; and said Court shall by its order then fix a time and place for the trial of said cause, which shall not be less than twenty or more than forty days from the time said order is made, and it shall be the duty of the marshal of the district in which said proceeding is pending to forthwith serve a copy of said petition and of said order upon each of the defendants and it shall be the duty of the defendants to file their answers to said petition within ten days after the service of the same upon them as aforesaid.

At the trial the findings of fact of said Commission as set forth in its report shall be *prima facie* evidence of the matters therein stated, and if either party shall demand a jury or shall omit to waive a jury, the Court shall, by its order, direct the marshal forthwith to summon a jury to try the cause; but if all the parties shall waive a jury in writing, then the Court shall try the issues in said cause and render its judgment thereon.

If the subject in dispute shall be of the value of two thousand dollars or more, either party may appeal to the Supreme Court of the United States under the same regulations now provided by law in respect to security for such appeal, but such appeal must

be taken within twenty days from the day of the rendition of the judgment of said Circuit Court.

If the judgment of the Circuit Court shall be in favor of the party complaining, he or they shall be entitled to recover a reasonable counsel or attorney's fee to be fixed by the Court which shall be collected as part of the costs in the case.

For the purposes of this Act excepting its penal provisions the Circuit Court of the United States shall be deemed to be always in session."

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SUPREME COURT OF THE UNITED STATES

October Term, 1898.

No. 244.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL , Appellants,

vs.

HENRY W. BEHLMER, Appellee.

APPEAL

FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

PART I.

STATEMENT OF CASE.

I.

PETITION BEFORE THE COMMISSION.

On December 29, 1892, the Appellee, Henry W. Behlmer, filed a petition before the Interstate Commerce Commission against the Appellants, the Memphis & Charleston Railroad Company; the East Tennessee, Virginia & Georgia Railway Company; the South Carolina Railway Company; Henry Fink and Charles M. McGhee, as Receivers of the East Tennessee, Virginia & Georgia Railway Company and the Memphis & Charleston Railroad Company; Daniel H. Chamberlain, as Receiver of the South Carolina Railway Company; the Central Railroad & Banking Company of Georgia, and the Louisville & Nashville Railroad Company, as lessees of the Georgia Railroad; and H. M. Comer, as Receiver of the Central Railroad & Banking Company of Georgia.

Said petition alleged, in brief, that said Memphis & Charleston R. R. extends from Memphis, Tenn., to Chattanooga, Tenn., a distance of 310 miles; that said E. T., V. & G. Ry. extends from Chattanooga, Tenn., to Atlanta, Ga., a distance of 152 miles; that said Georgia R. R. extends from Atlanta to Augusta, Ga., a distance of 171 miles; and that said South Carolina Ry. extends from Augusta, Ga., to Summerville, S. C., a distance of 115 miles; that said defendants are common carriers, under a common control, management or arrangement, for continuous carriage or shipment, and are engaged in the transportation of passengers and property wholly by railroad between the abovementioned points.

Said petition further alleged that Summerville is an incorporated town of considerable size and importance, situated on the South Carolina Railway, in the State of South Carolina, and distant 22 miles inland from Charleston, S. C.; that petitioner carries on a wholesale hay and grain business in said town, and is thus 22 miles nearer than Charleston to western points, where grain shipments originate; that on August 17, 1892, he received at Summerville, S. C., two carloads of hay, which he had ordered from Memphis, Tenn.; that said two carloads of hay were carried from Memphis to Summerville over the railroads aforesaid; that said two carloads of hay were hauled from Memphis to Summerville over the same line, in the same direction as Charleston, S. C., and under substantially similar circumstances and conditions as Charleston traffic; that the haul from Memphis to Summerville was, and is, 22 miles shorter than the haul from Memphis to Charleston, and the said shorter distance was, and is, included within the longer distance; that said petitioner was forced to pay 28 cents per 100 lbs. on said shipment of hay to Summerville, the shorter distance, whereas the rate to Charleston, the longer distance, was, and is, 19 cents per 100 lbs.; that this was in violation of the Fourth Section of the Act to Regulate Commerce; that said additional 9 cents per 100 lbs. which petitioner was forced to pay is a so-called local rate from Charleston to Summerville, a distance of 22 miles, whereas the through rate from Memphis to Charleston is 19 cents per 100 lbs., the distance being 771 miles; that said local rate is imposed by the South

Carolina Ry. Co., or its Receiver, who now operates the road, or by the Southern Ry. & S. S. Association.

Said petition further alleged that said so-called local rate of 9 cents per 100 lbs. for 22 miles is excessive and unreasonable, and that the aggregate charge of 28 cents per 100 lbs. from Memphis to Summerville is excessive and unreasonable, and in violation of Section 1 of the Act to Regulate Commerce; that the Georgia R. R. is operated under a joint lease to the Louisville & Nashville R. R. Co. and the Central R. R. & Banking Co. of Georgia, which last named company is in the hands of H. M. Comer, its Receiver; that all the above-mentioned lines are members of the Southern Ry. & S. S. Association; that the discrimination and excessive rates against Summerville exist not only on hay, as above set forth, but on all articles of Interstate Commerce coming to that place, much to the detriment and disadvantage of the town, and the business of its merchants.

Petitioner prayed, on behalf of himself and many others, that a notice issue to said railroads to cease and desist from violations of the law, as above set forth, and all similar violations.

Trans., pp. 7 to 9.

II.

Answers Before the Commission.

Answers were filed by Charles M. McGhee and Henry Fink, Receivers of the East Tennessee, Virginia & Georgia Ry. Co. and the Memphis & Charleston R. R. Co., Trans., pp. 16 to 17; by D. H. Chamberlain, Receiver of the South Carolina Ry. Co., Trans., pp. 13 to 16; and the Louisville & Nashville R. R. Co. and the Central R. R. & Banking Co. of Georgia, Assignees of the Lessee of the Georgia R. R. Trans., pp. 10 to 13.

The answer of the Louisville & Nashville R. R. Co. and the Central R. R. & Banking Co. of Georgia admitted that the railroads mentioned in the petition were common carriers, and were severally engaged in the transportation of persons and property

from Memphis, Tenn., to Charleston, S. C., under an agreement or arrangement for the continuous carriage or shipment of through freight from Memphis to Charleston, at certain agreed through rates; but it denied that they were under any common control or management.

Said answer admitted that Summerville is situated on the South Carolina Ry., and is distant 22 miles inland from Charleston; that the haul from Memphis to Summerville is 22 miles shorter than the haul from Memphis to Charleston, and that said shorter distance is included in the longer distance.

Said answer admitted that a greater compensation in the aggregate was received for the transportation of said two carloads of hay from Memphis to Summerville than would have been charged for the same if they had been transported to Charleston.

Said answer denied that the aggregate charge of 28 cents per 100 lbs. on hay from Memphis to Summerville is excessive or unreasonable; and it also denied that the local rate of 9 cents per 100 lbs. charged by the South Carolina Ry. Co., or its Receiver, between Charleston and Summerville is unjust or unreasonable.

Said answer denied that the acts complained of in the petition are in violation of the Fourth Section of the Act to Regulate Commerce; and it based said denial upon the following facts, which are distinctly averred in said answer:

First. That Summerville is a local station on the South Carolina Ry.; that it is not on any water route, and has but one railroad, and therefore it does not have the advantage of competition between carriers.

Second. That the South Carolina Ry. is not compelled by competition at Summerville to choose between a reasonable rate, and a rate which is much below what would otherwise be reasonable.

Third. That at Charleston there exists competition between the following rail routes running between Memphis and Charleston:

Route No. 1: Memphis & Charleston R. R.; East Tennessee, Virginia & Georgia R. R.; Savannah, Florida & Western Ry.; and Charleston & Savannah Ry.

Route No. 2: Memphis & Charleston R. R.; Western & Atlantic R. R.; Central R. R. of Georgia; Port Royal & Augusta R. R.; and Charleston & Savannah Ry.

Route No. 3: Memphis & Charleston R. R.; Western & Atlantic R. R.; East Tennessee, Virginia & Georgia R. R., or Georgia Central R. R.; Seaboard Air Line; Clinton, Newberry & Laurens R. R.; and the Atlantic Coast Line.

Route No. 4: Kansas City, Memphis & Birmingham R. R.; Central R. R. of Georgia; Port Royal & Augusta R. R.; and Charleston & Savannah Ry.

Route No. 5: K. C., M. & B. R. R.; Georgia Pacific R. R.; Richmond & Danville R. R.; and Atlantic Coast Line.

Route No. 6: K. C., M. & B. R. R.; Louisville & Nashville R. R.; Alabama Midland Ry.; Savannah, Florida & Western Ry.; and Charleston & Savannah Ry.

Route No. 7: Louisville & Nashville R. R.; Nashville, Chattanooga & St. Louis Ry.; Western & Atlantic R. R.; Georgia R. R.; and South Carolina Ry.

Route No. 8: Louisville & Nashville R. R.; Nashville, Chattanooga & St. Louis Ry.; Western & Atlantic R. R.; Seaboard Air Line, and the Atlantic Coast Line, or Port Royal & Western Carolina Ry.; Port Royal & Augusta R. R.; and Charleston & Savannah Ry.

That said lines are not only potential, but active competitors for business between Memphis and Charleston.

Fourth. That Charleston is a port on the Atlantic coast, easily reached from the ports of Baltimore, Philadelphia, New York, Boston and other Eastern ports, from which hay is shipped by water; and if the rail lines from Memphis to Charleston charge rates to Charleston as high as the rate to Summerville, (although

the latter rate is in itself reasonable), no hay would be brought from Memphis to Charleston, and Charleston would be supplied with hay from North Atlantic ports; that the railroads running from Memphis to Charleston would lose the hay business, and Memphis would lose a hay market at Charleston.

Fifth. That rates on Western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made with a view to actual existing water competition. Western produce, such as grain, hay, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia and Baltimore, over continuous water routes via the lakes and and canal, or over combined rail and water routes.

Sixth. That all the rail lines seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered by the continuous water routes, or by the combined rail and water routes; that the all-rail routes make their rates as much higher as the difference in service will permit, and those rates are correspondingly adjusted from all Western points, such as Evansville, Cairo, St. Louis, Memphis, etc. That at present, the all-rail rate from Chicago to Charleston on hay, for instance, is 33 cents per 100 lbs.; from St. Louis, 28 cents; from Louisville, Evansville and Cairo, 23 cents; and from Memphis 19 cents.

Seventh. That the rate from Memphis to Charleston on hay is forced upon the defendant lines by actual, existing water competition, and by other competition which is also beyond defendants' control.

That the controlling element in said competition is the lake, canal, and ocean transportation between Chicago and Charleston; or the lake transportation from Chicago to Buffalo or other lake port, thence by rail to New York, thence by ocean to Charleston; or rail transportation from Chicago to Baltimore, Philadelphia or New York, thence by ocean to Charleston.

Trans., pp. 10 to 13.

III.

Report and Opinion of the Commission.

All the testimony that was taken in the case by the defendants was taken before the Commission; and it was directed to the support of the denials and averments contained in the answers.

The Commission filed its report and opinion, in which it stated the substance of the petition and answers aforesaid, and certain facts and conclusions; but it utterly failed to find whether the following were facts or not:

First. It failed to find whether the charge of 28 cents per 100 lbs. on hay from Memphis to Summerville is reasonable or unreasonable, just or unjust.

Second. It failed to find whether the local rate of 9 cents per 100 lbs. on hay charged by the South Carolina Ry., or its Receiver, between Charleston and Summerville is reasonable or unreasonable, just or unjust.

Third. It failed to find whether Summerville has more than one railroad, or whether it is located upon a water route or whether it has the advantage of any kind of competition between carriers.

Fourth. It failed to find whether there exists any competition between the eight different all-rail routes mentioned in the answers as running between Memphis and Charleston.

Fifth. It failed to find whether, if the rail lines from Memphis to Charleston were to charge rates to Charleston as high as the rate to Summerville, no hay would be brought from Memphis to Charleston; and whether Charleston would be supplied with hay from, or through the North Atlantic ports.

Sixth. It failed to find whether, if the rail lines from Memphis to Charleston were to charge rates to Charleston as high as the

rate to Summerville, said rail lines would lose the hay business, and Memphis would lose a hay market at Charleston.

Seventh. It failed to find whether the rates on Western produce to Charleston and other coast cities, such as Savannah, Port Royal and Brunswick, are made with a view to actual, existing water competition.

Eighth. It failed to find whether Western produce, such as hay, grain, etc., distributed from Chicago, can reach Charleston through the ports of New York, Philadelphia and Baltimore, over continuous water routes via the lakes and canal, or over combined rail and water routes.

Ninth. It failed to find whether the rail lines seeking to do business between Chicago and Charleston and other coast cities, are compelled to make their rates approximate those which are offered by the continuous water routes, or by the combined rail and water routes.

Tenth. It failed to find whether the all-rail routes make their rates as much higher as the difference in service will permit; and whether those rates are correspondingly adjusted from all western points, such as Evansville, Cairo, St. Louis, Memphis, etc.

Eleventh. It failed to find whether the rate from Memphis to Charleston on hay is forced upon the defendant lines by actual, existing water competition, or by other competition which is beyond the defendants' control.

Twelfth. It failed to find whether the controlling element in said competition is by lake, canal, and ocean transportation between Chicago and Charleston; or by lake transportation from Chicago to Buffalo, or other lake port, thence by rail to New York, thence by ocean to Charleston; or by rail transportation from Chicago to Baltimore, Philadelphia or New York, and thence by ocean to Charleston.

Trans., pp. 17 to 23.

IV.

The Commission announced, in its report and opinion, the following conclusions of law:

First. That the fact that there may be competition for the carriage of hay from Memphis to Charleston, by lines *which are subject to the Act*, does not justify the defendant carriers in departing from the general rule of the Fourth Section, *upon their own motion.*

Trans., pp. 21, 22.

Second. That the fact that hay may be carried to Charleston by various rail and water, or part rail and part water routes, *from points other than Memphis*, does not justify the defendant carriers in departing from the general rule of the Fourth Section, *upon their own motion.*

Trans., pp. 21, 22.

Third. That because Charleston is an important seaport and railroad center, and hay may be, and is, carried there from various points, is not a sufficient reason for a departure from the general rule of the Fourth Section, by the defendant carriers upon their own motion.

Trans. p. 22.

Fourth. That water competition, to justify lower long haul rates, must exist between the point of shipment, and the longer distance point of destination.

Trans., p. 22.

Fifth. That the competition of markets does not justify the carriers in departing from the general rule of the Fourth Section, *upon their own motion.*

Trans., p. 22.

Sixth. That one transportation line cannot be said to meet the competition of another transportation line for the carrying trade of any particular locality, unless the latter line could, and

would, perform the service alone, if the former did not undertake it.

Trans., p. 22.

Seventh. That if the rates from Memphis to Charleston are remunerative, the defendants cannot, in the face of the prohibition of the Fourth Section, and the provision in that section for the issuance of relieving orders, assume to say that such rates, though profitable on Charleston traffic, are insufficient for the transportation of carload quantities to a shorter distance point, on the same line, and in the same direction.

Trans., p. 22.

Eighth. The Commission ordered the defendants to desist "from charging, demanding, collecting, or receiving any greater compensation in the aggregate for the transportation of hay, or other commodities carried by them, under circumstances and conditions similar to those appearing in this case, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than they contemporaneously charge and receive for the transportation of hay and such other commodities, respectively, for the longer distance, from Memphis aforesaid to Charleston, in the State of South Carolina."

Tans., p. 24.

V.

Proceedings in the Circuit Court.

The defendants having declined to obey said order of the Commission, the said H. W. Behlmer filed a petition in the Circuit Court of the United States for the Fourth Circuit, Eastern District of South Carolina, to compel the defendants to obey said order.

Said petition in the United States Circuit Court was answered by the defendants thereto; and the testimony which had been taken before the Commission was, by stipulation, used in the Circuit Court.

On December 11, 1895, the cause was heard in the Circuit Court before Circuit Judge Charles H. Simonton, who delivered a written opinion, and the bill or petition was dismissed, Trans., p. 113; and from that decree the said Behlmer appealed to the United States Circuit Court of Appeals for the Fourth Circuit.

Trans., p. 114.

71. Fed. Rep., 835. Behlmer vs. L. & N. R. R. Co.

VI.

Finding of Facts by the Circuit Court.

The Circuit Court found the following facts to be true, viz.:

First. That petitioner is a resident of Summerville, an incorporated town on the line of the South Carolina Ry., about 22 miles from Charleston.

Trans., p. 108.

Second. That petitioner's two carloads of hay were shipped from Memphis, Tenn., to Chattanooga, Tenn., 310 miles, over the Memphis & Charleston R. R.; from Chattanooga, to Atlanta, Ga., 152 miles, over the East Tennessee, Virginia & Georgia R. R.; from Atlanta to Augusta, Ga., 171 miles, over the Georgia R. R.; and from Augusta, Ga., to Summerville, S. C., 115 miles, over the South Carolina Railway.

Trans., p. 108.

Third. That the through freight charge on hay from Memphis to Charleston is 19 cents per 100 lbs.

Trans., p. 108.

Fifth. *That Charleston is a competitive point between all-rail routes; rail-and-water routes;* and all-water routes.

Trans., p. 112.

Sixth. That "if the defendants had not consented with each other to lower the rate [from Memphis to Charleston,] *no hay whatever would come from the hay-producing territory tributary to Memphis; and all the*

Southeast Atlantic States would be compelled to rely on other portions of the West, North or Northeast for hay.

"*The evidence clearly shows that the rate to Charleston was forced down by this competition.*

"*No such competition exists at Summerville, a small inland town.*"

Trans., p. 112.

Seventh. That the 9 cents which petitioner was charged in addition to said 19 cents, was the rate of freight from Charleston to Summerville, approved by the Railroad Commissioners of South Carolina.

Trans., p. 108.

VII.

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS.

The Circuit Court of Appeals reversed the decree of the Circuit Court, and ordered the same to be remanded to the Circuit Court, with instructions to enter a decree requiring the present appellants and each of them to desist from charging, demanding, collecting or receiving any greater compensation in the aggregate for the transportation of hay, or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged for the transportation of hay, and other commodities respectively, for the long distance aforesaid to Charleston, in the State of South Carolina. Said Circuit Court was ordered to see that the requirements of said decree were immediately carried into effect, and enforced as provided for in the Act to Regulate Commerce; and to direct that the present appellants pay all costs, and in addition thereto such reasonable fee to the present appellee's counsel as the Court might under the circumstances of the case think proper and just.

Trans., p. 137.

The present appellants presented to said Circuit Court of Appeals a petition for rehearing.

Trans., pp 138 to 141.

The rehearing asked for, was refused.

Trans., p. 154.

Thereupon, the present appellants prayed for and obtained an appeal to this Court.

Trans., p. 161.

The case was decided in the Circuit Court of Appeals by a divided Court. The opinion of the majority will be found on pages 124 to 133; and the opinion of the minority will be found on pages 134 to 136, of the Transcript.

VIII.

Assignment of Errors.

The present appellants filed in the Circuit Court of Appeals their assignment of errors. Trans., pp. 155 to 158. It is as follows:

"On the 17th day of January, in the year of our Lord, eighteen hundred and ninety eight, came the said appellees, the Louisville & Nashville Railroad Company, and the Central Railroad & Banking Company of Georgia, and H. M. Comer, its Receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink and Charles M. McGhee, as Receivers of the last two mentioned roads; and the Southern Railway Company, the purchaser, assignee and successor of said East Tennessee, Virginia & Georgia Railway Company; and the South Carolina Railway Company and its Receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee and successor of the same, by Ed. Baxter and Joseph W. Barnwell, their solicitors, and say that in the decree rendered by said Circuit Court of Appeals in the above-entitled cause, on the 6th day of November,

1897, and in the record and proceedings in said cause in said Court, there is manifest error in this, to-wit:

I.

That said Circuit Court of Appeals erred in reversing and remanding the decree rendered in the above-entitled cause on January 22, 1896, by the Circuit Court of the United States for the District of South Carolina.

II.

That said Circuit Court of Appeals erred in instructing said Circuit Court to enter a decree herein, requiring the appellees and each of them to desist from charging, demanding, collecting or receiving any greater compensation in the aggregate, for the transportation of hay or other commodities carried by them, under circumstances and conditions similar to those set out in the petition filed in this cause, from Memphis, in the State of Tennessee, to Summerville, in the State of South Carolina, than that contemporaneously charged and received for the transportation of hay and other commodities respectively for the longer distance from Memphis aforesaid to Charleston, in the State of South Carolina; to see that the requirements of said decree are immediately carried into effect, and enforced as provided for in said Act to Regulate Commerce; and to further direct that the appellees pay all costs in this proceeding, and in addition thereto such reasonable fee to the appellant's counsel as that Court may, under the circumstances of this case, think proper and just.

III.

That said Circuit Court of Appeals erred in decreeing that said appellees should pay the costs of said cause in said Circuit Court of Appeals.

IV.

That said Circuit Court of Appeals erred in not affirming said decree rendered in said cause, January 22, 1896, by said Circuit Court of the United States for the District of South Carolina.

V.

That said Circuit Court of Appeals erred because it failed to adjudge and decree that the matters of equity alleged in the bill,

filed in the above-entitled cause, are fully denied in the answers, and are not sustained by the proof, and that said bill be dismissed.

VI.

That said Circuit Court of Appeals erred because it, in effect, decided that the rates charged by the above-named appellees for the transportation of hay and other commodities carried by them from Memphis, Tenn., to Summerville, S. C., are unjust and unreasonable.

VII.

That said Circuit Court of Appeals erred because it, in effect, decided that the transportation of hay and other commodities carried by the above-named appellees, from Memphis, Tenn., to Summerville, S. C., is a like and contemporaneous service, under substantially similar circumstances and conditions, with the transportation of hay and other commodities carried by the above-named appellees from Memphis, Tenn., to Charleston, S. C.

VIII.

That said Circuit Court of Appeals erred because it, in effect, decided that as the above-named appellees make a greater charge in the aggregate on hay and other commodities, carried by them from Memphis, Tenn., to Summerville, S. C., than they make on such freight from Memphis, Tenn., to Charleston, S. C., they thereby give to Charleston, S. C., and its traffic, an undue or unreasonable preference or advantage; and subject Summerville, S. C., and its traffic, to an undue or unreasonable prejudice or disadvantage.

IX.

That said Circuit Court of Appeals erred because it, in effect, decided that the transportation by the above-named appellees, of hay and other commodities carried by them from Memphis, Tenn., to Summerville, S. C., is transportation conducted under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, the shorter being included within the longer distance, as compared with the transportation by the above-named appellees, of hay and other commodities carried by them from Memphis, Tenn., to Charleston, S. C.

X.

That said Circuit Court of Appeals erred because it, in effect, decided that the Interstate Commerce Commission has the power to fix the rates of transportation to be charged by the above-mentioned appellees for carrying freight from Memphis, Tenn., to Summerville, S. C.

XI.

That the said Circuit Court of Appeals erred in directing that a counsel fee should be paid to the counsel of appellant in said Court, and in not deciding that the Act known as the Interstate Commerce Act, in so far as it directs the payment of a counsel fee to the successful party complaining against railroad corporations engaged as carriers of interstate commerce, while it provides for no similar counsel fee to such railroad companies in case judgment be in their favor, is unconstitutional and void, inasmuch as it deprives such railroad companies of their property without due process of law.

XII.

That said Circuit Court of Appeals erred in not sustaining the decree of the Circuit Court dismissing the petition of appellant as against the South Carolina & Georgia Railroad Company, appellee, on the ground that the said company was not served with the order of the Commission requiring said company to desist from charging any greater compensation in the aggregate for transportation of hay or other commodities from Memphis to Summerville than that contemporaneously charged and received from Memphis to Charleston.

XIII.

That said Circuit Court of Appeals erred in deciding that there was any proof whatever of the service of a copy of the order of the Interstate Commerce Commission made in said cause upon the appellee, the South Carolina & Georgia Railroad Company; and in not deciding that it was beyond the power of the Circuit Court after dismissing the petition of appellant to alter, correct or amend said decree after the term had expired in which the decree dismissing said petition was filed.

XIV.

That said Circuit Court of Appeals erred in reversing the decree of the Circuit Court which found that the appellee, The South Carolina & Georgia Railroad Company, was not bound by the proceedings before the Interstate Commerce Commission brought against D. H. Chamberlain, Receiver, of the South Carolina Railway Company, unless proof was made of the service upon said appellant of a copy of the order of said Interstate Commerce Commission, and in deciding that the purchase at a foreclosure sale of the property of the South Carolina Railway Company by a committee of its mortgage bondholders and the conveyance of said property to a new corporation, the South Carolina & Georgia Railroad Company, was a mere change of name.

Wherefore the above-named appellees, the Louisville & Nashville Railroad Company, the Central Railroad & Banking Company of Georgia, and H. M. Comer, its Receiver, as lessees of the Georgia Railroad; the Memphis & Charleston Railroad Company, the East Tennessee, Virginia & Georgia Railway Company, and Samuel Spencer, Henry Fink, and Charles M. McGhee, as Receivers of said last two mentioned roads; and the Southern Railway Company, the purchaser, assignee, and successor of said East Tennessee, Virginia and Georgia Railway Company; the South Carolina Railway Company, and its Receiver, Daniel H. Chamberlain; and the South Carolina & Georgia Railroad Company, the purchaser, assignee, and successor of the same, pray that the said decree of said United States Circuit Court of Appeals for the Fourth Circuit, rendered November 6, 1897, be reversed and that said Court be ordered to enter a decree affirming the said decree rendered on the said 22d day of January, 1896, in the above-entitled cause by the said Circuit Court of the United States for the District of South Carolina.

ED. BAXTER,
Solicitor for said Appellees, as of Record.

JOSEPH W. BARNWELL,
Solicitor for South Carolina & Georgia Railroad Company."

PART II.

STATEMENT OF FACTS.

IX.

Charleston and Summerville.

Summerville has a population of 2,219. It is situated on the South Carolina Ry., 22 miles inland from Charleston. It is not situated on any water course, and has but one railroad.

Trans., p. 61.

Charleston has a population of 44,955. It is the center of three railroad lines. It situated on the ocean; and is at the junction of Ashley and Cooper Rivers, both of which are navigable.

X.

The Hay-Producing Territories.

There are three hay-producing territories from which Charleston can be, and is, supplied.

First. The territory contiguous to Boston, New York, Philadelphia and Baltimore.

Second. The territory contiguous to Chicago.

Third. The territory contiguous to Memphis.

Trans., pp. 63, 64, 71, 72.

The territory contiguous to Boston, New York, Philadelphia and Baltimore, designated as the "Eastern Territory," is composed of the following States, and, as shown by the United States census of 1890, their production of hay is as follows:

Maine	1,192,228	tons.
New Hampshire	659,368	"
Vermont	1,205,953	"
Massachusetts	793,167	"
Rhode Island	101,392	"
Connecticut	612,906	"
New York	6,675,658	"
New Jersey	661,791	"
Pennsylvania	4,331,582	"
Total	16,234,045	"

The territory contiguous to Chicago, designated as "Chicago Hay Territory," is composed of the following States, and parts of States, and, as shown by said census, their production of hay is as follows:

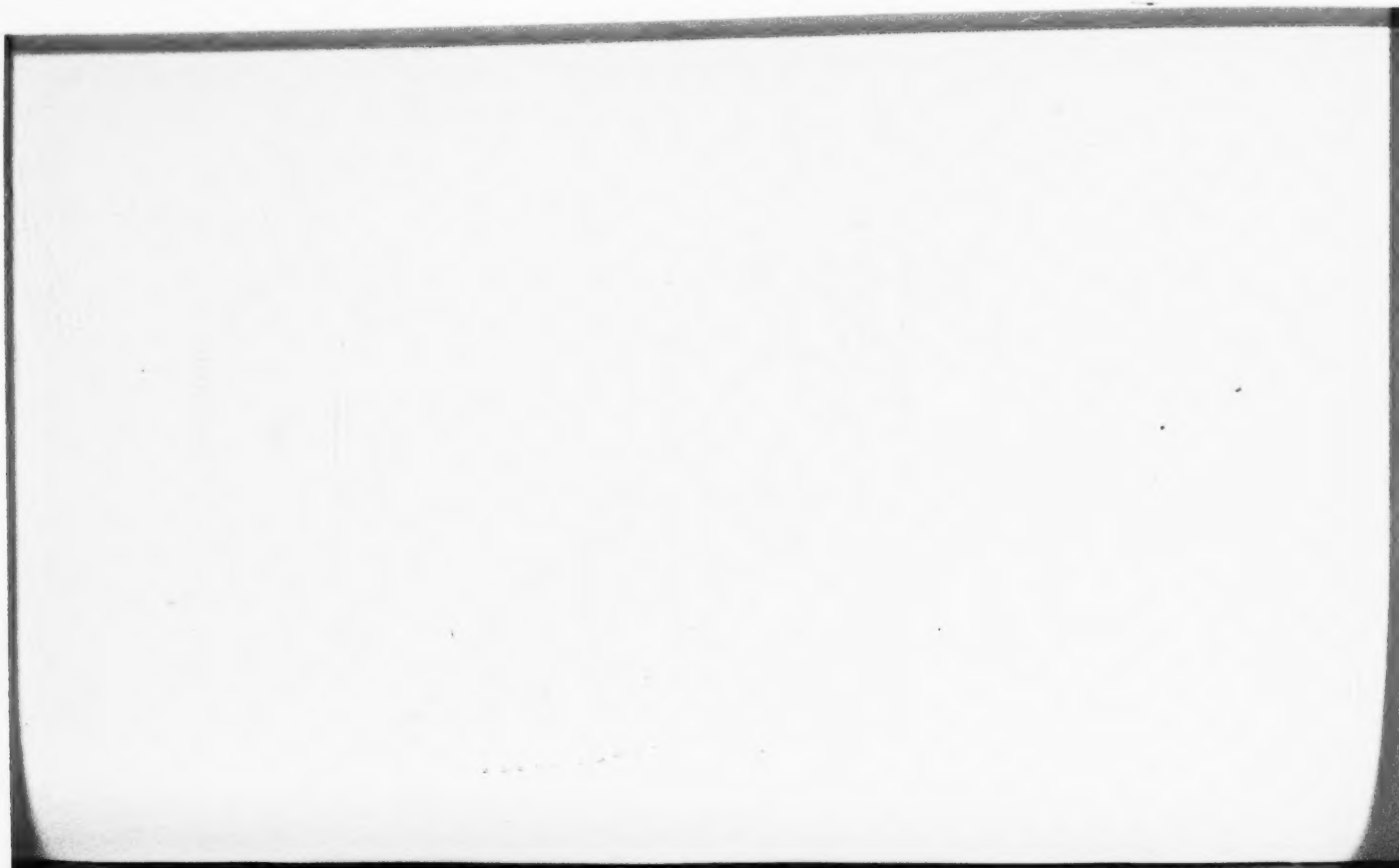
North Dakota	531,472	tons.
South Dakota	1,541,524	"
Minnesota	3,135,241	"
Wisconsin	2,981,521	"
Michigan	2,385,155	"
Eastern Iowa	3,632,350	"
Northern Illinois	2,455,552	"
Northern Indiana	1,370,522	"
Total	18,033,337	"

The territory contiguous to Memphis, designated as "Memphis Hay Territory," is composed of the following States, and parts of States, and, as shown by said census, their production of hay is as follows:

Nebraska	3,115,398	tons.
Western Iowa	3,632,350	"
Kansas	4,854,960	"
Missouri	3,567,635	"
Southern Illinois	2,455,552	"
Southern Indiana	1,370,522	"
Total	18,996,417	"

The following diagram (A) shows the three territories from which Charleston can be, and is, supplied with hay:

DIAGRAM A.



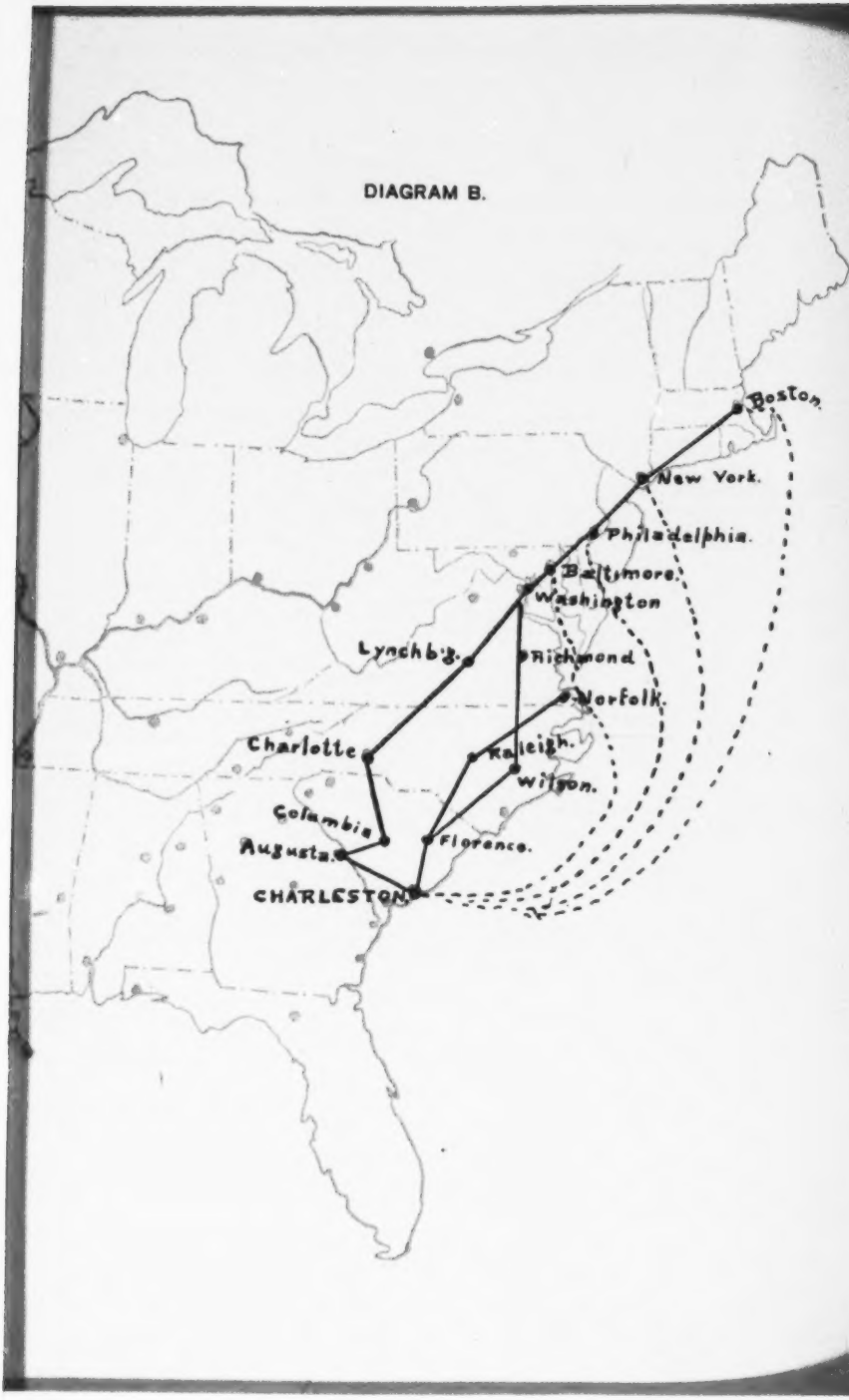


DIAGRAM B.
Boston.
New York.
Philadelphia.
Baltimore.
Washington
Lynchb'g.
Richmond
Norfolk.
Charlotte
Raleigh.
Wilson.
Columbia
Augusta.
Florence.
CHARLESTON

XI.

Transportation Lines from the "Eastern Hay Territory" to Charleston.

Hay can be shipped from Boston, New York, Philadelphia or Baltimore *via* steamship or sailing vessels to Charleston, or it may be shipped all rail.

The opposite diagram (B) shows some of said transportation lines:

XII.

Transportation Lines from the "Chicago Hay Territory" to Charleston.

Hay can be shipped from Chicago by lake to Buffalo; thence by the Erie canal to Albany; thence by the Hudson River to New York; thence by ocean to Charleston.

It can also be shipped from Chicago to Erie, Pa., by lake; thence *via* Pennsylvania R. R. to Boston, New York, Philadelphia and Baltimore; thence *via* rail, or *via* ocean to Charleston.

It can also be shipped all rail *via* Cincinnati, Louisville, Evansville and Cairo.

The following diagram (C) shows some of said transportation lines:

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

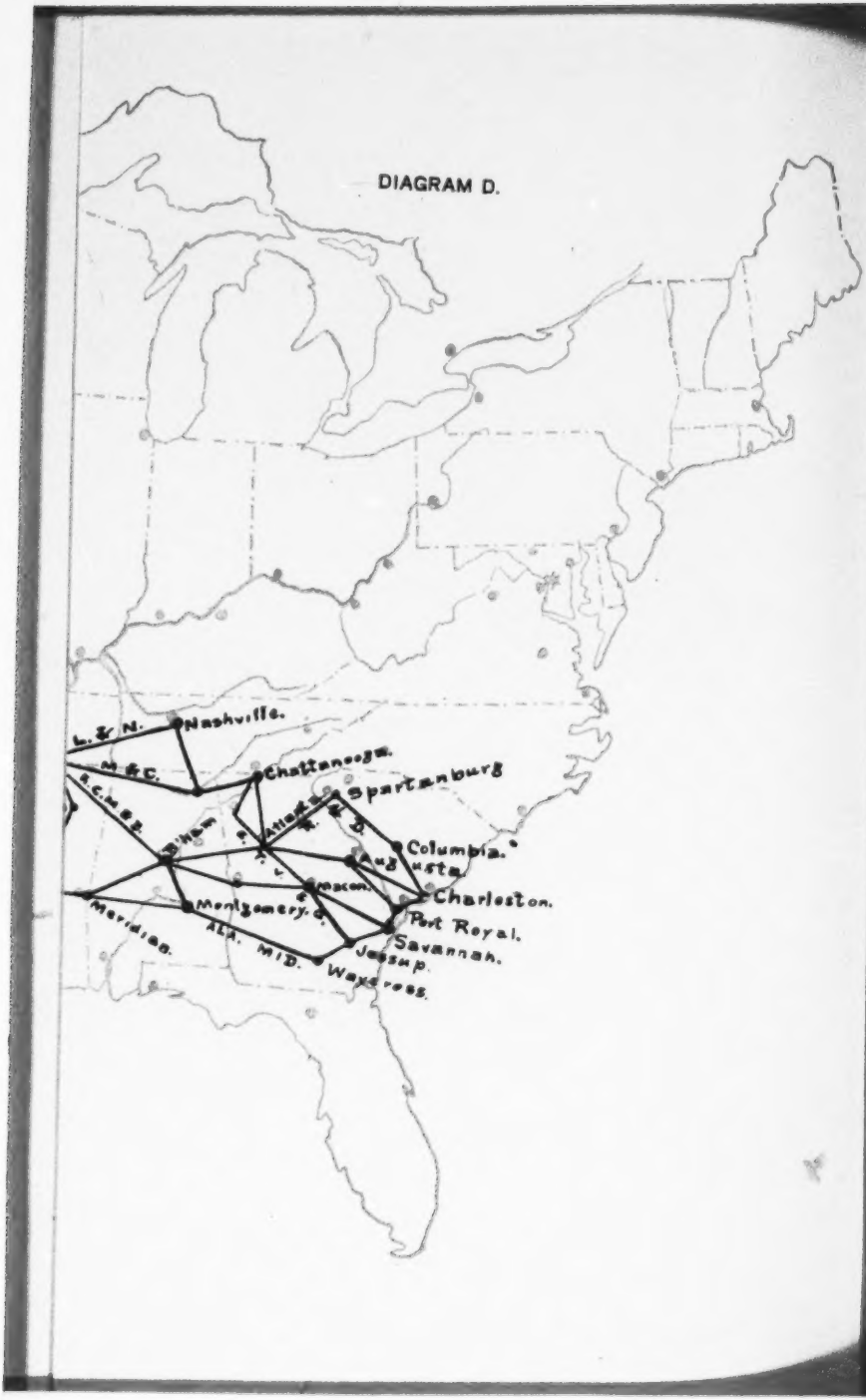


DIAGRAM D.
L. & N.
Nashville.
M & C.
Chattanooga.
S.C.M.&R.
Spartanburg
Columbia.
Augusta
Macon.
Charleston.
Montgomery.
Port Royal.
Savannah.
Meridian.
ALA. MID.
Jessup.
Waycross.

XIII.

Transportation Lines from the "Memphis Hay Territory" to Charleston.

Hay can be shipped from Memphis to Charleston, all rail, by the following initial lines and their connections, viz.:

The Memphis & Charleston R. R. and its connections;

The Kansas City, Memphis & Birmingham R. R. and its connections;

The Louisville & Nashville R. R. and its connections;

The Illinois Central R. R. and its connections.

Said lines not only offer to compete, but they actually compete, and actually carry the traffic.

Trans., p. 55.

The opposite diagram (D) shows said initial lines and some of their connections:

XIV.

Rates on Hay from the "Eastern Hay Territory" to Charleston.

In the "Official" classification hay is sixth class; and in the "Southern Railway and Steamship Association" classification it is Class D.

Trans., pp. 73, 74.

From Boston to Charleston the regular tariff rate of the Clyde Steamship Co. on Class D (hay), is 20 cents per 100 lbs.

Trans., pp. 66, 83.

From New York and Philadelphia to Charleston the regular tariff rate of the Clyde Steamship Co. on hay, is 14 cents per 100 lbs.

Trans., pp. 66, 83.

Schooner rates on hay can be obtained from New York and Philadelphia to Charleston, much below the Clyde tariff rates.

Trans., p. 68.

In fact, a rate of 8 cents per 100 lbs. can be obtained on hay, from New York to Charleston.

Trans., p. 76.

From Baltimore to Charleston a rail and water rate of 17 cents per 100 lbs. on hay can be obtained *via* the Virginia ports, Norfolk, etc.

Trans., p. 67.

And a schooner rate of 4 cents per 100 lbs. from Baltimore to Charleston can be obtained on grain or hay.

Trans., p. 58.

XV.

Rates on Hay from the "Chicago Hay Territory" to Charleston.

From Chicago, *via* Ohio River points, to Charleston, an all-rail rate on Class D (hay), of 33 cents per 100 lbs. can be obtained.

Trans., p. 58.

From Chicago, *via* Baltimore, to Charleston, a rail and schooner rate of 26 cents per 100 lbs. can be obtained.

Trans., p. 58.

From Chicago, *via* New York, to Charleston, a lake, canal and ocean rate of 22 cents per 100 lbs. can be obtained.

Trans., p. 84:

From Chicago, *via* Baltimore, to Charleston, a lake, rail and schooner rate of 16 cents per 100 lbs. can be obtained.

Trans., p. 58.

The route last mentioned is by lake from Chicago to Erie, Pa., *via* the Erie & Western Trans. Co.; by rail from Erie to Baltimore over the Pennsylvania R. R.; and by schooner from Baltimore to Charleston.

The lake and rail rate from Chicago to Baltimore is 12 cents per 100 lbs.

Trans., 58, 103.

The schooner rate from Baltimore to Charleston is 4 cents per 100 lbs.; thus making a total rate from Chicago to Charleston by lake, rail and schooner of 16 cents per 100 lbs.

Trans., p. 58.

XVI.

Rates on Hay from the "Memphis Hay Territory" to Charleston.

From Memphis to Charleston the all-rail rate on hay is 19 cents per 100 lbs.

Trans., pp. 53, 66.

The rate from Memphis to Charleston was reduced from 23 cents, to 19 cents, in 1891, on account of the movement by rail and water lines; and if this rate were restored to 23 cents, the traffic would go back to the water lines.

Trans., 78, 72, 77.

Grain and hay come from Chicago mostly by lake and rail.

Trans., p. 70.

The fact as to whether grain and hay come to Charleston from Chicago, depends upon the price of hay at Chicago, and other points.

Trans., p. 70.

Large shipments of grain have been made from Chicago to Charleston, *via* the lakes, canal and the ocean.

Trans., pp. 62, 68, 77, 85.

The effect of that traffic is to reduce the business of the rail lines, which run from Memphis, and other Mississipi and Ohio River points to Charleston.

Trans., p. 68.

Water competition (from Chicago, New York, etc.) regulates the rail rates to Charleston from Memphis and the West.

Trans., p. 85, 71, 72.

When the lakes are open, the business *via* the all-rail lines (from Memphis and the West) is materially affected.

Trans., p. 58.

The rate from New York to Charleston, *via* the Clyde Steamship Line, is $1.60 per ton; while the rate from Memphis to Charleston *via* appellees' lines is $3.80 per ton.

Trans., p. 59.

The price of hay in New York on a given day is $15 per ton, as against $12.70 per ton in Memphis.

Trans., p. 59.

Hay purchased in New York, with freight added, will cost, delivered in Charleston, $16.60 per ton; while hay purchased in Memphis, on the same day, with freight added, will cost, delivered in Charleston, $16.50 per ton.

Trans., p. 59, 77.

If the rate of 19 cents from Memphis to Charleston were raised to 25 cents, hay would stop coming from Memphis; and Charleston merchants would purchase all their hay in the East.

Trans., p. 77.

Or the hay would be brought to Charleston by lake, canal, and ocean from Chicago, rather than by rail from Memphis.

Trans., p. 86.

XVII.

The Rate on Hay from Charleston to Summerville.

The rate on hay from Charleston to Summerville is 9 cents per 100 lbs.

Trans., pp. 53, 66.

It is the local rate of the South Carolina Ry., as allowed by the Railroad Commission of that State, for a distance of 21 miles.

Trans., pp. 61, 66.

There is no proof that said rate is unreasonable or unjust.

XVIII.

The Rate on Hay from Memphis to Summerville.

The rate from Memphis to Summerville is 28 cents per 100 lbs.; it is what is known as a combination rate; and it is based on Charleston.

The appellees have made a joint through rate on hay from Memphis to Charleston of 19 cents per 100 lbs., Trans., p. 53; and they have also made a joint through rate from Memphis to Augusta of 22 cents per 100 lbs.

Trans.. p. 55.

But they have never made a joint through rate on hay from Memphis to Summerville.

Trans., p. 53.

Summerville being a non-competitive, local station, on the South Carolina Ry., situated 116 miles east of Augusta and 22 miles west of Charleston, the rate from Memphis to Summerville must necessarily be a combination rate; and it must be based either on the joint through rate from Memphis to Augusta, or on the joint through rate from Memphis to Charleston.

The joint through rate from Memphis to Augusta, as stated above, is 22 cents per 100 lbs.

Trans., p. 55.

The local rate from Augusta to Summerville is 15 cents per 100 lbs.

Trans., p. 54.

It follows that if the combination rate from Memphis to Summerville were based on Augusta, it would be the sum of 22 and 15—or 37 cents.

Trans., p. 55.

The joint through rate from Memphis to Charleston, as stated above, is 19 cents per 100 lbs.

Trans., p. 53.

The local rate from Charleston to Summerville is 9 cents per 100 lbs.

Trans., p. 61.

By basing the rate from Memphis to Summerville, on Charleston, a combination rate is obtained from Memphis to Summerville of only 28 cents; whereas, if it had been based on Augusta, the combination rate would have been 37 cents; or 9 cents higher than the rate which is now charged.

Trans., pp. 54, 55.

XIX.

The rate from Memphis to Summerville is 28 cents per 100 lbs.

The distance from Memphis to Summerville is 750 miles.

Taking the scale of rates adopted by the Georgia Railroad Commission, as reasonable rates, and extending said scale to 750 miles, it would give a rate of 31 cents per 100 lbs.

Trans., p. 60.

The South Carolina Railroad Commission's scale of rates, if extended to 750 miles, would give a rate of 35 or 36 cents.

Trans., p. 60.

The rate charged by the appellees from Memphis to Summerville is, therefore, less than it would be if the scale of reasonable rates of either the Georgia or South Carolina Railroad Commission were adopted as a standard of comparison.

Again, the rate per ton, per mile, from Memphis to Summerville is ..... .0075
Trans., p. 91.
The rate, per ton, per mile, from Memphis to Charleston is .0049
Trans., p. 91.
Difference ..... .0026

It will be seen, therefore, that the rate per ton, per mile, from Memphis to Summerville is only $2\frac{6}{10}$ *mills* higher than the rate per ton, per mile, from Memphis to Charleston.

XX.

The Proportion Received by the South Carolina Railway Out of the Rate from Memphis to Charleston.

The South Carolina Ry. receives $3\frac{7}{10}$ cents per 100 lbs. out of the rate of 19 cents per 100 lbs. from Memphis to Charleston.

Trans., p. 67.

The length of the haul by the South Carolina Railway from Augusta to Charleston being 138 miles, $3\frac{7}{10}$ cents for 100 lbs. would be equal to $4\frac{1}{10}$ mills per ton, per mile.

Trans., p. 73.

This rate of $4\frac{1}{10}$ mills per ton, per mile, though very low, is more than the additional cost per ton, per mile, of hauling the hay from Augusta to Charleston.

Trans., p. 73.

The additional cost per ton per mile, of hauling two carloads of hay from Augusta to Charleston is very small, because of the fact that while the locomotives of the South Carolina Ry. can haul from 33 to 35 cars from Augusta to Charleston (Trans., p. 73), the average number of freight cars in a train on that road is only 28 (Trans., p. 107); and of that number, there is an average of only 16 loaded cars in each train (Trans., p. 107). The result is that from five to eight additional cars to the train can be hauled from Augusta to Charleston, for very much less than the average cost per ton, per mile, of hauling all classes of freight over the road.

Trans., p. 73.

XXI.

The estimated average cost per ton, per mile, of hauling all classes of freight over the South Carolina Ry. is $7\frac{44}{100}$ mills.

Trans., p. 73.

As shown in Section XX., the South Carolina Ry. is forced by competition to accept $4\frac{6}{10}$ mills per ton, per mile, on hay shipped from Memphis to Charleston.

Now, $4\frac{6}{10}$ mills is $2\frac{76}{100}$ mills less than the estimated average cost per ton, per mile, (viz., $7\frac{36}{100}$ mills) of hauling all classes of freight over that road; and if the South Carolina Ry. were compelled to carry all its freight at $4\frac{6}{10}$ mills per ton, per mile it would entail a loss of $2\frac{76}{100}$ mills on every ton carried one mile.

For the year ended June 30, 1892, the number of tons carried one mile over that road was 74,311,037.

Trans., p. 106.

And a loss of $2\frac{76}{100}$ mills per ton, per mile, would represent a total loss on the freight traffic of $206,584.68.

For the year ended June 30, 1892, there was an actual deficit of $58,479.55, in the operation of the South Carolina Railway.

Trans., p. 106.

That deficit would have been increased to $265,064.23, if the South Carolina Railway had been compelled to carry all its freight at the same rate per ton, per mile, that it was forced by competition to accept on hay carried from Memphis to Charleston.

If that railway were forced to reduce its local rates to the proportion which it receives out of through rates, it would be practically ruined.

Trans., p. 72.

XXII.

The Two Competing Rail Lines From Augusta to Charleston.

There are two competing rail lines from Augusta to Charleston.

Line No. 1 is the South Carolina Ry.; and the distance by that line is 138 miles.

Trans., p. 61.

Line No. 2 is the Port Royal and Augusta Ry. in connection with the Charleston & Savannah Ry.; and the distance by that line is 148 miles.

Trans., p. 61.

The difference in distance between the two lines is only 10 miles.

Trans., p. 61.

Line No. 2 competes with Line No. 1 (Trans., p. 61), and Line No. 2 will accept business coming from Memphis, and carry it from Augusta to Charleston, at the same proportion of the through rate (19 cents), as is accepted by Line No. 1.

Trans., p. 61.

The Appellants, whose railroads are west of Augusta, could have delivered Appellee's hay to Line No. 2, at Augusta. It would have been carried by that line to Charleston; and the through rate from Memphis to Charleston by that line would have been the same as by Line No. 1, *i. e.*, 19 cents. Appellee would then have been compelled to pay 9 cents per 100 lbs. to the South Carolina Ry. to have the hay carried from Charleston to Summerville. The combination rate from Memphis, *via Charleston* to Summerville, would have been the same as the rate that was charged in this case, *i. e.*, 28 cents.

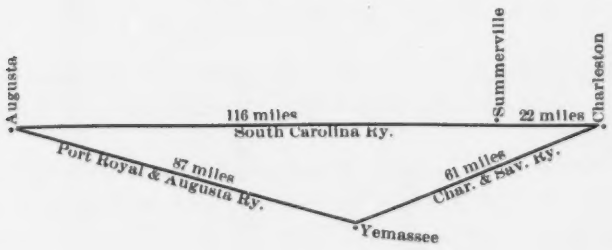
Trans., pp. 61, 62.

If the hay had been sent by Line No. 2, *via Charleston*, to Summerville, there would not have been a less charge for a longer than for a shorter distance. The Fourth Section of the Act would not have been involved; and no complaint would have been made that the combination rate of 28 cents per 100 lbs. from Memphis to Summerville was unjust or unreasonable.

The Appellant has paid no more than he would have paid if the hay had been sent by Line No. 2. In fact, he has saved ten miles in distance; he has avoided a transfer at Charleston; and he has received his shipment in less time, and in better condition, than if it had been sent by Line No. 2.

The following diagram (E) sufficiently illustrates the two competing lines from Augusta to Charleston:

DIAGRAM E.



Augusta to Charleston via South Carolina Railway..... ..... 138 Miles

Augusta to Charleston via Port Royal and Augusta Railway and Charleston and Savannah Railway .... 148 Miles

XXIII.

Contrast Between Northern and Southern Railroads in Reference to Charging Less for a Longer than for a Shorter Distance.

Appellee proved in the Circuit Court that railroads in what is known as "Central Territory," and in what is known as "Trunk Line Territory," do not "*usually*" or "*generally*" charge less for a longer than for a shorter distance.

Trans., p. 88.

The "Central Territory" and the "Trunk Line Territory," together, cover the territory between Chicago and New York.

Trans., p. 87.

The Interstate Commerce Commission, for statistical purposes, has divided the United States into ten territorial groups.

The territory between Chicago and New York comprises groups III and II; and the territory between Memphis and Charleston comprises groups V and IV, as designated by the Commission.

Statistics of Railways (1894), Frontispiece.

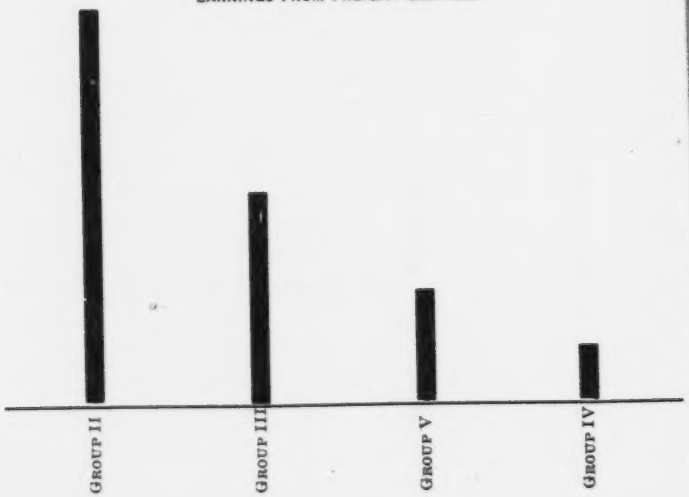
The statistician to the Commission has published a number of diagrams to illustrate certain comparisons between the railroads in the various groups.

The following diagram (F) illustrates the difference between the railroads in groups II, III, IV and V in their "earnings from from freight service" during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 4.

DIAGRAM F.

"EARNINGS FROM FREIGHT SERVICE."

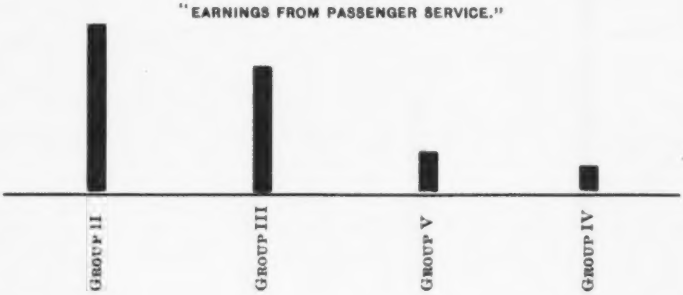


The following diagram (G) illustrates the difference between said railroads in their "earnings from passenger service" during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 4

DIAGRAM G.

"EARNINGS FROM PASSENGER SERVICE."

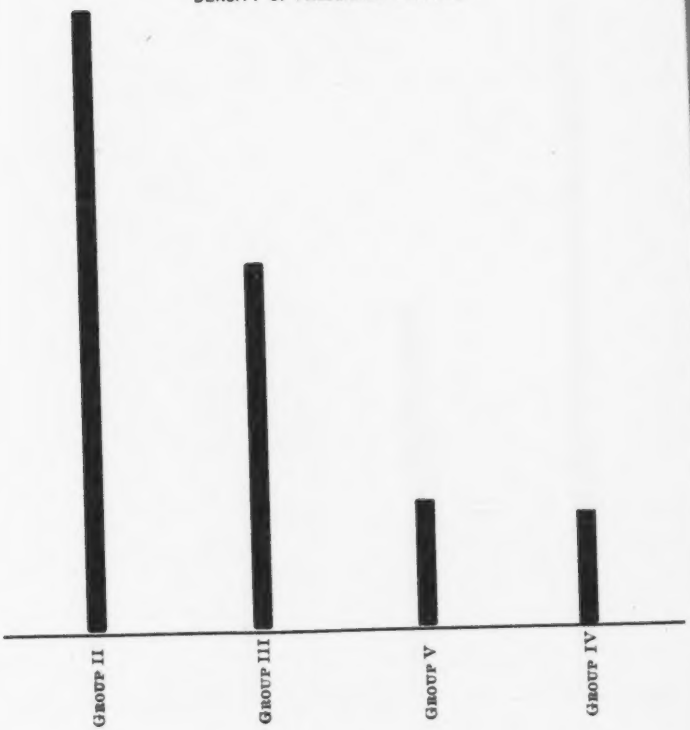


The following diagram (H) illustrates the difference between said railways in "the density of passenger traffic" during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 6.

DIAGRAM H.

"DENSITY OF PASSENGER TRAFFIC."

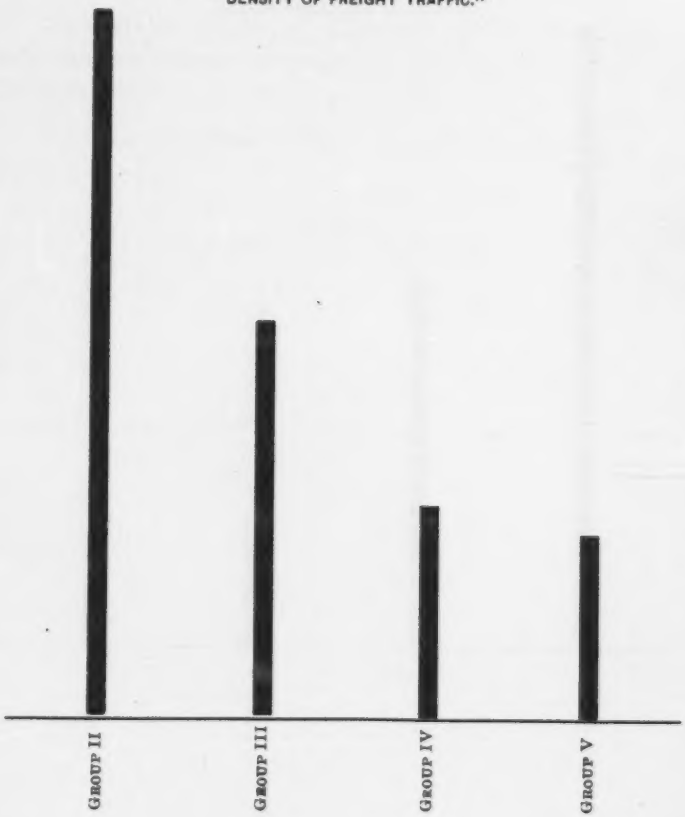


The following diagram (I) illustrates the difference between said railroads in "the density of freight traffic" during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 7.

DIAGRAM I.

"DENSITY OF FREIGHT TRAFFIC."

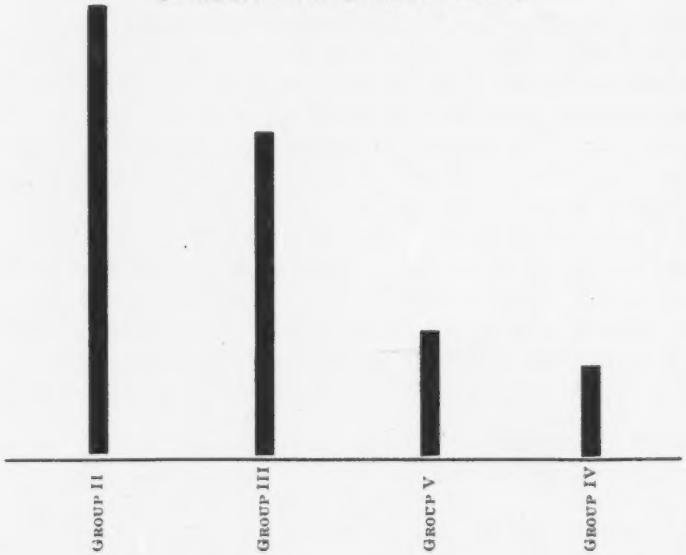


The following diagram (J) illustrates the difference between said railroads in the proportion of capital stock upon which dividends were paid during the year 1894.

Statistics of Railways (1894). Appendix Diagram No. 2.

DIAGRAM J.

"CAPITAL UPON WHICH DIVIDENDS WERE PAID."



PART III.

ARGUMENT.

XXIV.

The Section of the Act to Regulate Commerce Upon Which the Order Made by the Commission in This Case was Based.

The Commission did not base the order made by it in this case either upon the first section, which relates to the reasonableness of rates; nor upon the second section, which relates to unjust discrimination in rates; nor upon the third section, which relates to unjust prejudice in rates. The Commission based said order upon the fourth section alone; it being the section which relates to charging more for a short than for a long haul.

The material part of the order has been heretofore copied in section IV of this argument, and it shows upon its face that said order is based alone upon what is known as the long and short haul clause of the fourth section. Every other issue that might have been decided by the Commission was treated by it as immaterial to the issue which was made upon the fourth section. Upon this point the Commission said:

"If it shall appear in this case that the defendants violate the long and short haul clause of the law by keeping the higher rate to Summerville in force, it will be unnecessary to consider in this report whether the rate to Summerville is in violation of other provisions of the law. In that event the prohibition of the fourth section will afford all the reduction demanded by the complaint."

Trans., p. 20.

The Circuit Court, also, treated the long and short haul clause of the fourth section as presenting the controlling question in the case.

The Circuit Court, in its opinion, said:

"The controlling question in this case is: Have these defendants violated the provisions of the 4th section of the act of Congress, approved 4th February, 1887?"

Trans., p. 110.

The Court of Appeals, also, treated the fourth section as presenting the real question in the case.

The Court of Appeals, in the majority opinion, said:

"This brings us to the real question in this case, and that is, Have these defendants violated the provisions of the fourth section of the act of Congress, approved February 4, 1887, entitled 'An act to regulate commerce'?"

Trans., pp. 129–130.

Judge Morris, in his dissenting opinion in the Court of Appeals, said:

"The Commission considered only the allegation that the defendants violated the long and short haul clause, and in view of their decision on that point deemed it unnecessary to consider whether any other provision of the law had been violated."

Trans., p. 134.

A mere reading of the report and opinion of the Commission, however carelessly or carefully it may be done, is sufficient to satisfy any one that the Commission intended to base its order in this case upon the long and short haul clause of the fourth section.

It is equally manifest that the majority of the Court of Appeals intended to base the decree of that court upon the long and short haul clause of the fourth section. It was said in the majority opinion: "We do not find it necessary to consider and dispose of the questions raised in the pleadings and argued by counsel, concerning the Southern Railway and Steamship Association, nor the matter of the added local charge of 9 cents from Charleston to Summerville, otherwise than it may be involved in the through rate to Summerville."

Trans., p. 133.

XXV.

The Reasons Stated by the Commission for Making the Order in this Case.

The Commission, in its report and opinion, said :

"The defendants claim that substantial dissimilarity in such circumstances and conditions is created by :

1. The competition of various markets for the trade of Charleston ; such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all water lines, or by all rail, or part rail and part water routes.

2. The competition of all rail lines between Memphis and Charleston." * * *

"There is no showing in this proceeding of competition by lines *not subject to the act to regulate commerce* for the carriage of hay from Memphis to Charleston, and the mere fact that there may be competition for such traffic by lines which are *subject to the act*, or that hay may be carried to Charleston by various rail and water, or part rail and part water routes from points other than Memphis, does not justify the defendant carriers in departing from the general rule of the fourth section upon their own motion. Such considerations may constitute reasons for applying to the Commission for relief under the proviso clause of that section, but for reasons stated in our decisions of the cases above cited, they do not justify carriers in departing from the rule of the fourth section *without such a relieving order*." * * *

"The competition of markets, or the competition of carrying lines *subject to regulation under the act to regulate commerce* does not justify carriers in making greater short haul or lower long haul charges over the same line *without an order issued by the Commission* on application therefor and after investigation." * * *

"Because Charleston is an important seaport and railroad centre, and hay may be and is carried there from various points, is not sufficient reason for a departure from this rule."

Trans., pp. 21–22.

The reasons as above set forth by the Commission for making its order in this case were approved by the majority opinion of the Court of Appeals.

Trans., pp. 130–131.

XXVI.

The Fact that Competing Carriers are Subject to the Act does not Render It Necessary for Them to Apply to the Commission for Relief from the Fourth Section.

The Commission and the Court of Appeals were correct in stating that one of the claims made by defendants was that substantial dissimilarity in circumstances and conditions is created by "the competition of all rail lines between Memphis and Charleston."

In Section XIII of this argument I referred to the testimony which enumerates those lines, and which shows that they not only offer to compete but actually compete, and actually carry the traffic.

The Commission and the majority of the Court of Appeals hold, in effect, that the competition which exists between those lines cannot be considered by them in making rates, without first obtaining the permission of the Commission; and the only reason assigned for such holding is that all of said lines are "subject to the act to regulate commerce."

The majority of the Court of Appeals say:

"And we further hold that competition between carriers subject to the requirements of said Act does not produce such substantial dissimilarity in the circumstances and conditions under which transportation is performed as will justify such carriers in making a greater charge for the shorter than for the longer haul, without an order to that effect from the Commission, granted by it as provided for in the proviso to the fourth section."

Trans., p. 132.

In the case of the Interstate Commerce Commission vs. Alabama Midland Railway Co., this Court say:

"We are unable to suppose that Congress intended by the fourth section, and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do," etc.

168 U. S., p. 169.

Again this Court say:

"That competition is one of the most obvious and effective circumstances that make the conditions under which a long and short haul is performed substantially dissimilar, and as such must have been in the contemplation of Congress in the passage of the Act to Regulate Commerce, has been held by many of the Circuit Courts."

I. C. C. vs. Ala. Midland Ry. Co., 168 U. S., p. 164.

It will be seen that this Court overruled the doctrine announced by the Commission and the majority of the Court of Appeals in this case to the effect that the competition of carriers subject to the Act to Regulate Commerce, does not create circumstances and conditions which the carriers can take into account in determining for themselves, in the first instance, whether they are justified under the fourth section in charging more for shorter than for longer distances over their lines.

The Commission in its Eleventh Annual Report, in commenting upon the decision of this Court in the Alabama Midland Case, says:

"The defendants (i. e., in the Alabama Midland Case) insisted that the fact of *railway competition* at Montgomery made the circumstances and conditions at Troy and at Montgomery dissimilar, and that, therefore, the inhibition of the fourth section did not apply. The Commission had held in many previous cases, and held in this case (i. e., the Alabama Midland Case), that *railway competition* between carriers *subject to the provisions of the Act* could not of itself create the necessary dissimilarity in circumstances and conditions. This contention is not sustained by the Supreme Court, which holds that such compe-

tition does create that dissimilarity, and that the higher rate to Troy is not prohibited by the fourth section."

The italics are mine.

11 Ann. Rep., I. C. C. (1897), p. 38.

Again, the Commission says:

"That section (i. e., the fourth) enacts that the carrier shall not charge more for the short than for the long haul under substantial similar circumstances and conditions. If the circumstances and conditions are similar, the greater charge cannot be made. If the circumstances and conditions are not similar, the section does not apply. The Court holds (i. e., in the Alabama Midland Case) that *railway competition* of controlling force makes the circumstances dissimilar. If, therefore, we find in a particular case that competition of controlling force actually exists, that ends the matter."

11 Ann. Rep., I. C. C. (1897), p. 43.

Again, the Commission says:

"On November 8, 1897, the Supreme Court held, in the case entitled Interstate Commerce Commission vs. Alabama Midland Ry. Co. et al. (the Troy Case, 168 U. S., ———), that *railroad competition* may create discriminating (dissimilar?) circumstances and conditions under the fourth section and thereby justify greater charges for the shorter haul."

11 Ann. Rep., I. C. C. (1897), p. 91.

In the Case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et. al., decided December 31, 1897, the Commission, in speaking of the defense relied upon in certain instances in that case, says:

"In all other instances, the justification relied upon is the existence of railway competition between carriers subject to the Act to Regulate Commerce. The Commission has uniformly held, up to the present time, that this species of competition does not create the necessary dissimilarity of circumstances and conditions under that section, and such would have been its decision in this case upon the law as it was supposed to be when the findings of fact were prepared. Since then, however,

the Supreme Court of the United States by its decision in the case, *Interstate Commerce Commission vs. Alabama M. R. Co.*, decided November 8th, 1897, 168 U. S., 144, 42 L. Ed. ——, has determined that this view of the law is erroneous, and that railway competition may create such dissimilar circumstances and conditions as exempt the carrier from an observance of the long and short haul provision. Under this interpretation of the law as applied to the facts found in this case, we are of the opinion that the charging of a higher rate to the intermediate points, as set forth, is not obnoxious to the fourth section. The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' If the conditions and circumstances are not substantially similar, then the section does not apply and the carrier is not bound to regard it in the making of its tariffs. The Court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point that rate is not made under the same circumstances and conditions as is the rate at the intermediate point and the higher rate is not prohibited by the fourth section."

7 I. C. Rep., pp. 479, 480, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co. et. al.

It will be seen that the Commission expressly concedes that the doctrine announced by it in the case at bar, to the effect that the competition of carriers subject to the Act to Regulate Commerce does not create circumstances and conditions which the carriers can take into account, has been overruled by this Court in the Alabama Midland case.

XXVII.

Judge Severens' Error in Holding That the Fourth Section May Apply, Notwithstanding There May be a Substantial Dissimilarity of Conditions.

Counsel for appellee may rely upon the opinion of Judge Severens in the case of Interstate Commerce Commission vs.

East Tennessee, Virginia & Georgia Railroad Co. et al. (known as the Chattanooga Board of Trade case), 85 Fed. Rep., p. 107.

In that case Judge Severens, referring to the decision of the Commission in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co. et al., says that the Commission, "evidently disheartened by the adverse rulings of the Supreme Court in recent cases," . . . "seems to give up section 4 as of no force or effect in any case where the conditions are not 'substantially similar.'"

85 Fed. Rep., 117.

The Judge, after referring to the language quoted by me in the last preceding section of this argument from the decision of the Commission in that case, says:

"Now, I do not understand that such a conclusion follows from that decision (i. e., the decision of the Supreme Court in the Alabama Midland Railway case). On the contrary, I suppose that when a violation of the long and short haul provision is charged, competition is one of the elements which enter into the determination, whether the conditions are similar, and if dissimilarity is found, *then the further question arises whether the dissimilarity is so great as to justify the discrimination which is complained of.* . . . . . In other words, my opinion is that the restraint of *section* 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates, and that it is competent, *under that section*, to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

I. C. C. vs. E. T. V. & G. Ry. Co., et al., 85 Fed. Rep., p. 118.

I respectfully submit that there is manifest error in Judge Severens' construction of the fourth section. It is a construction which has never been given to that section by any other court; nor by the Commission in any of its decisions. The material part of section 4 is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater

compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance."

In Re Southern Ry. & S. S. Association (sometimes cited as In Re L. & N. R. R. Co.), 1 I. C. Rep., p. 280, Judge Cooley in speaking of the effect of the introduction into the fourth section of the phrase, "under substantially similar circumstances and conditions," said:

"Here we have clearly stated what is unlawful and forbidden; and for doing the unlawful and forbidden act penalties are then provided. But that which the act does not declare unlawful must remain lawful if it were so before; and that which it fails to forbid, the carrier is left at liberty to do without permission of any one. The charging or receiving the greater compensation for the shorter than for the longer haul is seen to be forbidden only when both are under substantially similar circumstances and conditions; and, therefore, if in any case the carrier, without first obtaining an order of relief, shall depart from the general rule, its doing so will not alone convict it of illegality, SINCE IF THE CIRCUMSTANCES AND CONDITIONS OF THE TWO HAULS ARE DISSIMILAR THE STATUTE IS NOT VIOLATED."

This language of Judge Cooley was quoted approvingly by Judge Ross, in the case of I. C. C. vs. A. T. & S. F. R. R. Co., 50 Fed. Rep., pp. 300, 301; and see Behlmer vs. L. & N. R. R. Co., 71 Fed. Rep., p. 839; Brewer & Hanleiter vs. Central of Georgia Railway Co., 84 Fed. Rep., p. 261; I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., pp. 168, 169.

Judge Severens is right in saying that the Commission "seems to give up section 4 as of no force or effect in any case *where the conditions are not substantially similar;*" but he is mistaken in supposing that the Commission's yielding of its position was due to the Commission being "disheartened by the adverse ruling of the Supreme Court in recent cases." It will be seen that In Re Southern Ry. & S. S. Association referred to above, and which was one of the very first cases decided by the Commission, the Commission speaking through Judge

Cooley gave "up section 4 as of no force or effect in any case *where the conditions are not substantially similar.*"

His language in that case was that "if the circumstances and conditions of the two hauls are dissimilar, the statute is not violated."

The construction of the fourth section suggested for the first time by Judge Severens, would, if sound, require an amendment of the fourth section such as is indicated by capitals in the following paragraph:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; AND EVEN WHERE THE CIRCUMSTANCES AND CONDITIONS ARE SUBSTANTIALLY DISSIMILAR, SUCH DISSIMILARITY MUST BE IN DUE PROPORTION TO THE EXISTING DISPARITY IN RATES."

His Honor's construction is:

"That the restraint of Section IV. is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates;" and it is impossible to put that construction upon the fourth section unless, by judicial legislation, the Court adds to the language of that section some such provision as is indicated by capitals in the preceding paragraph.

In the recent case of the United States vs. Trans-Missouri Freight Association, this Court refused to read into the Anti-Trust Act an exception or provision which altered the natural meaning of the language used, and that too upon a material point.

166 U. S., 329.

The construction which Judge Severens proposes to put upon the fourth section is new, but it is not useful; because, if the disparity in rates between the shorter and longer distance point be such as to constitute an undue preference in favor of the

latter, or an undue prejudice against the former, relief can be given under the third section of the Act. If, however, the disparity does not constitute any undue preference in favor of the longer distance point, nor any undue prejudice against the shorter distance point, it does no harm to any one; and it ought not to be prohibited, as it is proposed to do, by the judicial amendment suggested by Judge Severens.

The Commission, in its Eleventh Annual Report, commenting upon the decision of this Court in the Alabama Midland case, upon the fourth section, says:

"If the circumstances and conditions are similar, the greater charge cannot be made. IF THE CIRCUMSTANCES AND CONDITIONS ARE NOT SIMILAR, THE SECTION DOES NOT APPLY. The Court holds that railway competition of controlling force makes the circumstances dissimilar. IF, THEREFORE, WE FIND, IN A PARTICULAR CASE, THAT COMPETITION OF CONTROLLING FORCE ACTUALLY EXISTS, THAT ENDS THE MATTER. WE HAVE NO POWER TO SAY WHETHER, NOR TO WHAT EXTENT, SUCH COMPETITION JUSTIFIES THE HIGHER RATE TO THE INTERMEDIATE POINT."

"THE THIRD SECTION IS STILL LEFT, AND UNDER THAT SECTION WE MAY INQUIRE WHETHER, UNDER ALL THE CIRCUMSTANCES, THE RATES AS ADJUSTED GIVE AN UNDUE PREFERENCE TO THE COMPETITIVE POINT, but the fourth section is, by this decision, eliminated from the Act."

11 Ann. Rep., I. C. C. (1897), p. 43.

The Commission is wholly mistaken in supposing that the fourth section is eliminated from the Act by the decision of this Court in the Alabama Midland Railway case. If the circumstances and conditions are substantially similar, then, under the fourth section, the carrier is prohibited from charging more for a short than for a long haul, *whether the disparity in rates does or does not give an undue preference to the longer distance point.* If, however, the circumstances and conditions are substantially dissimilar, while the fourth section can have no operation, the third section remains operative, and under that section, the Court can decide whether the disparity in rates constitutes an undue preference in favor of the longer distance point, or an undue prejudice against the shorter distance point.

In the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., the Commission again commenting upon the decision of this Court in the Alabama Midland Ry. case upon the fourth section, says:

"The section declares that the carrier shall not make the higher charge to the nearer point under 'substantially similar circumstances and conditions.' IF THE CONDITIONS AND CIRCUMSTANCES ARE NOT SUBSTANTIALLY SIMILAR, THEN THE SECTION (i e., THE FOURTH) DOES NOT APPLY, and the carrier is not bound to regard it in the making of its tariff. The Court has decided that railway competition, if it exists, must be considered. If, therefore, such competition does actually control the rate at the more distant point, that rate is not made under the same circumstances and conditions as is the rate to the intermediate point, and the higher rate is not prohibited by the *fourth* section."

"WHETHER THOSE RATES ARE IN VIOLATION OF THE THIRD SECTION, IN THAT THEY GIVE AN UNDUE PREFERENCE TO THE MORE DISTANT POINT, IS A DIFFERENT QUESTION, WHICH MIGHT ARISE IN CASES OF THIS KIND."

7 I. C. Rep., pp. 479, 480, Savannah Bureau of Freight and Transportation vs. Charleston & Savannah Ry. Co. et al.

In all cases where a greater charge is made for a shorter than for a longer haul, the whole question can, according to Judge Severens, be settled under the fourth section; and the third section, under his construction, is, in such cases, of no value whatever.

But, according to the construction which the Commission puts upon the decision of this Court in the Alabama Midland Ry. Case, and which construction, *in that respect*, is, I think, the correct one, IF THE CIRCUMSTANCES AND CONDITIONS ARE SUBTANTIALLY DISSIMILAR THE FOURTH SECTION DOES NOT APPLY; BUT THE THIRD SECTION REMAINS, AND, UNDER THAT SECTION, IT MAY BE DETERMINED WHETHER THE DISPARITY IN RATES CONSTITUTES AN UNDUE PREFERENCE OF THE LONGER DISTANCE POINT.

Judge Severens is mistaken in supposing that the Commission is "disheartened by defeat," or that its comments upon

the decision of this Court are the mere exclamations of a panic-stricken fugitive. On the contrary, the Commission, with a clear conception of what this Court has decided in reference to the fourth section, has fallen back upon the third and first sections of the Act; and the opinion of the Commission in the recent case of Calloway vs. L. & N. R.R. Co. et al., 7 I. C. Rep., p. 431, unmistakably indicates that the Commission intends to use the third and first sections in the future, in all cases of a greater charge for a shorter distance, where the circumstances and conditions are substantially dissimilar; and where, for that reason, the fourth section has no application.

It may be argued by counsel for appellee that Judge Severens' construction of the fourth section finds some support in the following language used by this Court in the Alabama Midland Railway Case:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections, but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration, in determining the question of 'undue or unreasonable preference or advantage,' or 'what are substantially similar circumstances and conditions.' The competition may in some cases be such as, having due regard to the interests of the public and of the carrier, ought justly to have effect upon the rates, and in such cases; there is no absolute rule which prevents the Commission or the Courts from taking that matter into consideration."

168 U. S., p. 167.

Surely nothing can be found in the language just quoted to sustain Judge Severens in his proposition, that *though the circumstances and conditions may be substantially dissimilar, the "restraint of section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates.*"

This Court, in saying that "we do not hold that the mere fact of competition, no matter what its character or extent,

necessarily relieves the carrier from the restraints of the third and fourth sections," did not intend to intimate that either section contains any such restraint as that the rates must be "upon the scale of comparison between the dissimilarity of conditions and the disparity of rates." The only restraint contained in the fourth section is that the carrier shall not charge more for a shorter than for a longer haul under substantially similar circumstances and conditions; and this Court, in saying that the mere fact of competition, no matter what its charactor or extent, does not necessarily relieve the carrier from the restraint of the fourth section, *means that competition which is fictitious or ineffective, or in which the public has no interest, shall not be taken into consideration at all*, as a circumstance or condition affecting the transportation. If, however, the competition be genuine and effective, and if it subserves the interest of the public, as well as that of the carrier, it may be taken into consideration; and in such a case, it will relieve the carrier from the restraint of the fourth section, i. e., from charging more for a shorter than for a longer haul. But the restraint of the third section remains; and if the disparity in rates constitutes an undue preference of the longer distance point, the rates may be declared unlawful under the restraint of that section, notwithstanding they may not offend against the restraint of the fourth section at all.

Judge Severens seems to doubt the soundness of his own construction of the fourth section, and to concede that it may become necessary to fall back upon the third section. His language is:

"But the long and short haul clause is only one of the specific provisions employed for the general purpose of the Act. The third section underlies the fourth and supplies the principles on which it rests; so that if the literal construction referred to be put upon the fourth section, the case would still be exposed to the third section, which forbids undue preference to one locality or the subjection of another to any undue disadvantage."

85 Fed. Rep., p. 117.

The only error in the language just quoted consists in the proposition that "the third section underlies the fourth and supplies the principles on which it rests."

The third section does *not* underlie the fourth. The third

section covers ground which is entirely distinct from that which is covered by the fourth section.

The *third* section does not prohibit *any* preference *unless it is undue or unreasonable;* while the *fourth* section prohibits a greater charge for the shorter than for the longer distance, if the circumstances and conditions be substantially similar, *whether such disparity of rates does or does not constitute an undue or unreasonable preference of the longer distance point.*

XXVIII.

Judge Severens' Error in Supposing that this Court held that the Rigor of the Fourth Section can be Moderated.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., et. al., referred to above, Judge Severens uses this language:

"Conceding that some allowance should be made for the conditions at Nashville (the longer distance point), the rigor of the rule of the long and short haul clause of the fourth section, moderated to some extent, *as it was held might be done in the case of the Commission vs. The Alabama Midland Railway Company*, 168 *U. S.* 144, the disproportion in the present case is too gross."

85 Fed. Rep., pp. 112, 113.

The italics are mine.

I respectfully deny that it was held, or even intimated by this Court in the Alabama Midland Railway Case, that "the rigor of the rule of the long and short haul clause of the fourth section" could be "moderated to some extent," or to any extent.

The case was decided upon the ground that the long and short haul clause of the fourth section *did not apply at all;* and not upon the ground that "the rigor" of that clause had been properly or improperly "moderated." If the circumstances and conditions are substantially similar, and a greater charge is made for a shorter than for a longer distance, etc., no court

has the power to "moderate" the rigor of the fourth section to the slightest extent. If, in such a case, the charge to the shorter distance point exceed the charge to the longer distance point, even to the extent of a mill, such charge is absolutely prohibited by the fourth section; and no power is vested in any court to moderate the rigor of the prohibition.

The carrier, upon application to the Commission, may in special cases be relieved from the operation of the fourth section; but as no application has been made to the Commission for relief in the case at bar, it is unnecessary to discuss the question whether the Commission would, upon such an application, have the power to moderate the rigor of the fourth section; or whether it would be limited to granting or refusing full absolution. But whatever power the Commission might have under a special application for relief, it is certain that in a case where no application for relief has been made to the Commission, no Court has the right to moderate, to any extent whatever, the rigor of the long and short haul clause, in any case to which it applies.

XXIX.

Judge Severens' Error as to what was held by the Lower Courts in the Alabama Midland Case.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., et al., referred to above, Judge Severens, in commenting upon the decision of this Court in the Alabama Midland case, uses this language:

"*Both the courts below had concurred in holding that the Commission was wrong in thinking the disparity of charges was too great in view of the facts,* and the Supreme Court did not find sufficient reason for reversing their decree." 85 Fed. Rep., p. 114.

The italics are mine.

I respectfully deny that either the Circuit Court, or the Court of Appeals, decided the Alabama Midland Railway Case upon the ground that the Commission was wrong "*in thinking the*

disparity of charges was too great." Neither of those courts intimated that "the restraint of section 4 is to be applied upon the scale of comparison between the dissimilarity of conditions and the disparity of rates."

That "scale of comparison" was invented for the first time by Judge Severens; and neither the Circuit Court, nor the Court of Appeals, attempted to use it in the Alabama Midland Railway Case. Both of those courts decided that case on the ground that the circumstances and conditions were substantially dissimilar, and therefore *that the fourth section did not apply at all.* And neither of them attempted to discuss the question as to whether "the rigor of that section had been properly, or improperly, 'moderated' by the Commission."

See the Opinion of the Circuit Court in the Alabama Midland Ry. Case, 69 Fed. Rep., 227 to 233; and the opinion of the Circuit Court of Appeals in 74 Fed. Rep., 715 to 733.

XXX.

Judge Severens' Error in Supposing that this Court held that Competition is not to be Regarded as a Controlling Consideration.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., referred to above, Judge Severens said:

"The Supreme Court in that case, (i. e., the Alabama Midland Ry. case) while reaffirming the doctrine that competition between railway carriers might, and frequently ought to be, considered in adjusting rates under the long and short haul clause, yet took pains to prevent the inference from its opinion that it (competition) should be regarded as a *controlling* consideration."

85 Fed. Rep., p. 114.

I respectfully deny that this Court "took pains to prevent the inference that competition should be regarded as a *con-*

trolling consideration." On the contrary, I insist that the very point decided by this Court in the Alabama Midland Ry. case was that where competition *is such that it can be properly considered*, it *is* to be allowed to *control* in the making of rates.

I will hereinafter show that the competition at Charleston, the longer distance point, is "such as, having due regard for the interests of the public and of the carrier, ought justly to have effect upon the rates;" and therefore that it can be properly considered. And I will hereinafter show that if the competition be such as can be properly considered at all, it must, of necessity, be allowed to *control* in fixing rates at competitive points.

There can be no middle course. The Courts must hold either that competition *can* be considered, or that it *cannot* be considered, in fixing competitive rates.

If they hold that it cannot be considered in fixing competitive rates, then the short rail lines, and the water lines will have a monopoly of the transportation business of the country. If, on the other hand, the courts adhere to the doctrine decided by this Court in the Alabama Midland Ry. case, that competition, such as affects rates and such as subserves the interests of the public as well as of the carrier, may be considered in fixing competitive rates, then such competition must, of necessity, *control* in the fixing of those rates. All competing lines, however numerous they may be, must accept the lowest rates offered by any one of them, or all but one of them must abandon the competitive traffic altogether.

XXXI.

Judge Severens' Error in Holding that Congress Intended that there Must be Something Unusual and Peculiar in the Competition.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co., referred to above, Judge Severens said:

"As the circumstances vary infinitely and constantly in the course of such business, it would seem that Congress must

have intended something unusual and peculiar, out of the ordinary course, not ordinarily incident to the business, as that which would create a substantial dissimilarity; for otherwise, the vast bulk of transportation would not be subject to the rule at all."

85 Fed. Rep., p. 114.

The inference which counsel for appellee may seek to draw from the language just quoted is, that as competition between railroads which are subject to the Act to Regulate Commerce is "ordinarily incident to the business," and therefore not "unusual," or "peculiar," it cannot create a "substantial dissimilarity" within the purview of the fourth section.

If counsel's construction of his Honor's language is correct, his Honor has fallen into the very error for which the Commission was reversed in the Alabama Midland R'y case.

In the opinion delivered by the Commission in the Alabama Midland R'y case, it was said:

"No attempt is made to establish substantial dissimilarity of circumstances and conditions at Montgomery on the ground of rail competition further than by proof of the fact that there are a number of railway lines running to and through that city connecting with different parts of the country. This alone, it is scarcely necessary to say, is not sufficient. Re Louisville & Nashville R.R. Co., 1 Inters. Com. Rep., 278, 1 I. C. C. Rep., p. 31."

4 Inters. Com. Rep., p. 35, left col. Board of Trade vs. Alabama Midland R. Co.

It will be noticed that the Commission in deciding the question of rail competition in the Alabama Midland R'y case, based its opinion upon its previous decision In Re Louisville & Nashville R.R. Co.

In Re Louisville & Nashville R.R. Co. (sometimes cited as Re Southern Railway & Steamship Association), 1 Inters. Com. Rep., p. 278, it was held by the Commission that where railroads are subject to the Act to Regulate Commerce, compe-

tition between them could not be considered except in "*rare and peculiar cases.*"

1 Inters. Com. Rep., p. 278, right col., 5th head note, par. (c).

In the Alabama Midland Ry. case, there was no pretense that there was anything "rare," or "peculiar," or "unusual" in the competition between the various railroads which centered at Montgomery. It was conceded that all of said railroads were subject to the Act to Regulate Commerce; and the very question which this Court was asked to decide in that case was whether the competition between those rail lines at Montgomery, all of which were confessedly subject to the Act to Regulate Commerce, could properly be taken into consideration in fixing competitive rates to and from Montgomery.

While there was a question of fact in the Alabama Midland Ry. case as to whether there was any water competition at Montgomery, there was no question of law in that case as to whether water competition could be taken into consideration.

The Commission itself, in one of its earliest cases, had decided that water competition, and competition between rail carriers *not* subject to the Act to Regulate Commerce could be taken into consideration. It had also decided that competition, even between rail carriers subject to the Act, could be taken into consideration "*in rare and peculiar cases.*"

1 Inters. Com. Rep., p. 278, right col., 5th head note. In Re Southern R'y & S. S. Association.

None of those questions, therefore, were raised in the Alabama Midland Ry. case. The question raised in that case was whether competition between rail carriers subject to the Act, could be considered, *where there was nothing "rare," "unusual," or "peculiar" in it; and where it was in no wise different from other ordinary rail competition.* I understand this Court to have decided in that case, that if the competition be such as to affect rates, and such as subserves the public interest as well as the interest of competing carriers, it may be taken into consideration, notwithstanding all of the competing rail carriers are subject to the Act to Regulate Commerce, and notwithstanding there be nothing "rare," "unusual," or "peculiar" in the competition.

XXXII.

The Contention That Competition Cannot be Considered Except in Extreme Cases.

Counsel for appellee may refer to the fact that at the time the Act to Regulate Commerce was passed, and prior thereto, and since, the greater charge for the shorter than the longer haul, etc., only existed in cases of competition in transportation to the longer distance point; and he may argue that, as Congress knew this fact, it did not intend that competition in transportation should be an excuse in *all* cases, but only in certain *extreme* cases, where, in the language of this Court, "*the interest of the public as well as of the carrier demand it.*"

I concede that Congress did not intend that competition in transportation should be an excuse "in *all* cases."

I also concede that Congress did not intend that competition should be an excuse in any case, except where "the interests of the public as well as of the carrier demand it."

But I contend that where "the interests of the public as well as of the carrier" *do* demand it, Congress *did* intend that competition should be an excuse.

XXXIII.

Judge Severens' Error in Construing the Argument of Counsel for the Carriers as Contending that the Extent of the Discrimination Must be Confided to the Judgment of Railroad Officials.

In the case of I. C. C. vs. E. T., V. & G. Ry. Co., referred to above, Judge Severens said that the argument of counsel for the carriers in that case was, in effect, that "the *extent* of the

discrimination must be confided to the judgment of the railroad officials, whose ability and experience best qualify them for the task," and that "there is nothing for the Commission or the Court to do but to take notice of the fact that the conditions are dissimilar, and abandon all further inquiry."

85 Fed. Rep., p. 117.

His Honor misapprehended my argument in that case. I have never claimed that "the extent of the discrimination" must be confided to the judgment of railroad officials; nor have I ever denied the right of either the Commission, or the Court to review the judgment of railroad officials, on any question.

My argument in that case was, as it is in this case, that where the existence of competition at a longer distance point is such as to create a substantial dissimilarity between the circumstances and conditions which exist at that point, and those which exist at a shorter distance point, neither railroad officials, nor commissions, nor courts, can determine "the extent of the discrimination" by any such "scale of comparison between the dissimilarity of conditions and the disparity of rates" as was suggested by Judge Severens in that case.

My contention was, and is, that "the *extent* of the discrimination" *determines itself*. If the rates to the shorter distance point be reasonable within the purview of the first section, and competition forces lower rates to some longer distance point, there is but one question submitted either to the carrier, the Commission or the Court, and that is whether it will subserve the public interest, as well as the carrier's interest, for the carrier to compete at such longer distance point.

The decision of that question by the carrier may be reviewed either by the Commission, or the Court. But if the Commission or the Court agrees with the carrier that it will subserve the public interest, as well as the interest of the carrier, for the carrier to compete at the longer distance point, then "the extent of the discrimination" *will determine itself;* and it will amount to exactly the difference between the reasonable rates charged to the shorter distance point, and the lower rates forced by competition to be charged at the longer distance point;—whatever that difference may happen to be.

XXXIV.

The "Scale of Comparison" Suggested by Judge Severens cannot be used in Practical Rate-Making.

In the Case of I. C. C. vs. E. T., V. & G. Ry. Co. et al., Judge Severens said:

"In other words, my opinion is that the restraint of *section* 4 is to be applied upon *the scale of comparison between the dissimilarity of conditions and the disparity of rates*, and that it is competent under *that* section to restrain the exaction of the greater charge for the shorter haul, although there may be a substantial dissimilarity of conditions, provided the dissimilarity is not so great as to justify the discrimination made."

85 Fed. Rep., 118.

It is one thing to state a theoretical proposition, and quite another thing to formulate a practical rule.

In the enforcement of the Act to Regulate Commerce, the courts will necessarily be compelled to formulate certain rules for rate-making, to be followed by the railroad traffic managers of the country. The subject of rate-making is an eminently practical subject; and such rules as the courts may formulate must be such as can be practically applied to the commerce of the country, or they will be useless, if not injurious. With the utmost respect for Judge Severens, I submit that there is no theoretical mathematician who can understand what Judge Severens means by the phrase "the scale of comparison between the dissimilarity of conditions and the disparity of rates;" and I also submit that there is no practical railroad traffic manager, who can make out a tariff, or schedule of rates, upon any such "scale of comparison," as Judge Severens suggests.

This Court judicially knows that the railroad rates in Georgia are fixed by a Commission of that State; and therefore it is fair to presume that they are reasonably low.

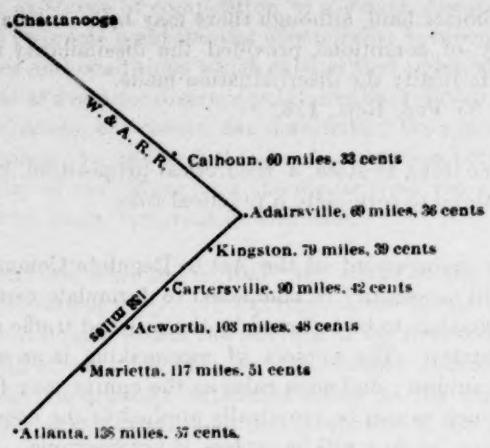
The Standard Freight Tariff as fixed by the Commission of

that State is printed on pp. 104–105 of the Transcript. It will be seen by reference to said tariff that the rates increase as the distance increases.

For the purposes of illustration I will take the case of the Western & Atlantic Railroad, which extends from Chattanooga to Atlanta, and I will assume that its rates are made in accordance with the Standard Freight Tariff prescribed by the Georgia Railroad Commission.

The following diagram has been drawn to a scale showing the distance from Chattanooga to each of certain stations on that road; and the rate on first-class freight, in cents per one hundred pounds, from Chattanooga to each of said stations as fixed by said tariff:

DIAGRAM NO. 1.



As counsel for the appellee contends that distance should be a controlling factor in the construction of rates, and as the local rates of the Western & Atlantic R.R. are constructed upon the basis of distance, it would seem that they ought to meet with his approval.

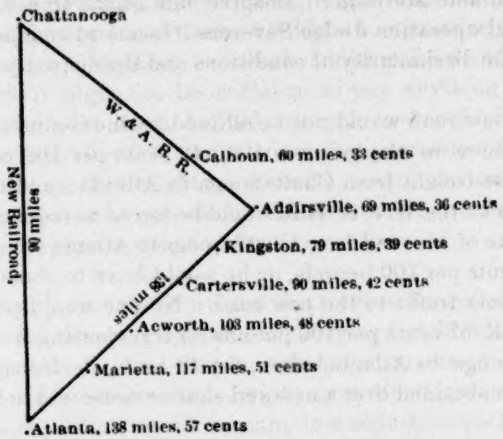
It will be seen from said diagram that the distance from Chattanooga to Atlanta via the Western & Atlanic R.R., is 138 miles; and for that distance the Western & Atlantic R. R. is allowed to charge 57 cents per 100 pounds on first-class freight.

It will also be seen that the distance from Chattanooga to Cartersville is 90 miles; and for that distance the Western & Atlantic R.R. is allowed to charge 42 cents per 100 pounds on first-class freight.

For many years the Western & Atlantic R.R. was the only rail line from Chattanooga to Atlanta. And as the rates from Chattanooga to all of said local stations were constructed upon a mileage basis, and as there was no instance where a greater charge was made for a shorter than for a longer distance, on traffic originating at Chattanooga, people living along the line of the Western & Atlantic R.R. were doubtless entirely satisfied with the rate adjustment on that traffic.

Suppose a new railroad were constructed from Chattanooga to Atlanta, over a line that is only 90 miles long, as shown in the following diagram:

DIAGRAM NO. 2.



Suppose that the local rates of the new road were fixed by the Georgia Railroad Commission, and fixed on the same basis as that upon which the local rates of the W. & A. R.R. are fixed.

As the distance from Chattanooga to Atlanta by the new road would be only 90 miles, the new road would be limited to

a maximum rate of 42 cents per 100 pounds from Chattanooga to Atlanta. In other words, the effect of the construction of the new road would be, for all practical purposes, to reduce the distance from Chattanooga to Atlanta from 138 miles to 90 miles, and to entitle Atlanta, upon a distance basis, to the same rates from Chattanooga, via the new road, as Cartersville is entitled to via the W. & A. R.R.

Cartersville would have no right to complain; because, though she would be nearer than Atlanta, to Chattanooga, measured by the W. & A. R.R., Atlanta, measured by the new line, would be as near as Cartersville, to Chattanooga.

Acworth and Marietta would have no right to complain; because, measured by the new road, Atlanta would be nearer than they, to Chattanooga.

The practical question arises, how ought the traffic manager of the W. & A. R.R. to readjust his rates from Chattanooga to Acworth and Marietta? Imagine him attempting to put into practical operation Judge Severens' "scale of comparison between the dissimilarity of conditions and the disparity of rates."

The new road would not be allowed by the Georgia Railroad Commission to charge more than 42 cents per 100 pounds on first-class freight from Chattanooga to Atlanta; and the traffic manager of the W. & A. R.R. would be forced to reduce the first-class rate of his road from Chattanooga to Atlanta from 57 cents to 42 cents per 100 pounds, or he would have to abandon all of the Atlanta traffic to the new road. No one would pay the W. & A. R.R. 57 cents per 100 pounds for transporting freight from Chattanooga to Atlanta, when, for 42 cents, its transportation could be obtained over a new and shorter route and in less time.

If the traffic manager of the W. & A. R.R. should conclude to abandon the Atlanta traffic the result would be that Atlanta and Chattanooga would be deprived of the competitive services of the W. & A. R.R.; and the W. & A. R.R., which had for many years performed all of the service between Chattanooga and Atlanta, would be prevented from performing any of it in the future. It would lose all the revenue which it had formerly realized from that traffic. The loss of revenue thus occasioned

would have to be made up by increasing the rates to and from the local stations on the W. & A. R.R. between Chattanooga and Atlanta, provided the Georgia Railroad Commission would permit those rates to be increased. And if said Commission should refuse to allow those rates to be increased, the W. & A. R.R., or its stockholders and creditors, would have to sustain the entire loss of revenue; except in so far, as by reducing the number of trains, and otherwise cheapening its transportation service, the W. & A. R.R. could economize in its expenditures.

If we suppose that the traffic manager of the W. & A. R.R. had ascertained that he could earn sufficient revenue, at the reduced rate from Chattanooga to Atlanta, to pay something more than the additional cost of movement, of the Atlanta traffic, he would naturally have determined to continue to carry freight from Chattanooga to Atlanta. It would still have been necessary for his trains to run from Chattanooga in the direction of Atlanta, in order to carry freight from Chattanooga to the local stations on the W. & A. R.R.; and the additional cost of carrying, in the same trains, a few cars of freight loaded at Chattanooga, and destined to Atlanta, would be comparatively small. If he could earn anything over such additional cost of movement, while it might not be sufficient to pay anything toward dividends, or even toward fixed charges, it would still be a profit *over what it would cost to move that particular freight;* and however small it might be, it would contribute something toward the operating expenses. At all events, it would not be any burden upon the other traffic.

We will suppose, therefore, that the traffic manager of the W. & A. R.R. did conclude to continue carrying freight from Chattanooga to Atlanta; and that he was forced to accept 42 cents per 100 pounds on first-class freight from Chattanooga to Atlanta. Such action would amount to a reduction of 15 cents per 100 pounds on that class of freight, from Chattanooga to Atlanta. Does Judge Severens mean that the rates from Chattanooga to Acworth and Marietta should be reduced *in the same proportion* as the rates from Chattanooga to Atlanta were reduced; or does he mean that the rates from Chattanooga to Acworth and Marietta should be reduced without regard to proportion, until they might be no higher than the rates from Chattanooga to Atlanta? If he does not mean either of these

things, what does he mean? The traffic manager of the Western & Atlantic R.R., in order to obey the decree of the Court, must have some *practical* rule upon which to reconstruct his schedule.

If it be said that the rates from Chattanooga to Acworth and Marietta should be reduced in the same proportion as the rates from Chattanooga to Atlanta are reduced, such reduction would not accord with the "scale of comparison between the dissimilarity of conditions and the disparity of rates." There would be no competitive circumstances or conditions whatever at Acworth or Marietta; while the competitive circumstances and conditions at Atlanta (caused by the construction of the new road) would be the sole cause of the reduction in rates from Chattanooga to that point.

If it be said that the rates from Chattanooga to Acworth and Marietta should be reduced, without regard to proportion, until they be no higher than the rates from Chattanooga to Atlanta by the new road, such a reduction would give to Acworth and Marietta an undue preference over Atlanta, provided distance be the controlling factor in rate construction; because, while, by the new road, the distance from Chattanooga to Atlanta would be only 90 miles, the distance from Chattanooga by the Western & Atlantic R. R. to Acworth is 103 miles, and to Marietta 117 miles.

If it be said that, though it might not be necessary to reduce the Acworth and Marietta rates in the same proportion as the Atlanta rates were reduced, and though it might not be necessary to make the Acworth and Marietta rates as low as the Atlanta rates, still there ought to be "some" reduction in the Acworth and Marietta rates, the practical question remains, *how much reduction shall be made?*

As the new road would not touch either Acworth or Marietta, its construction would not affect the circumstances and conditions existing at either of those points, and, therefore, I do not see why either of them should be entitled to any reduction in rates, merely because there had been a change of circumstances and conditions at Atlanta. But conceding, for the sake of argument only, that Acworth and Marietta would be entitled

to "*some*" reduction, the question remains as to what practical rule or principle should govern the traffic manager of the W. & A. R. R. in making up his schedule or tariff to put the reduction into effect? Again, this is but asking, in another form, what does Judge Severens mean by the phrase, the "scale of comparison between the dissimilarity of conditions and the disparity of rates"?

I repeat that there is no theoretical mathematician, or practical traffic manager, who can take the diagram referred to above, *and mark opposite each of the local stations on the W. & A. R.R. between Cartersville and Atlanta the rate that ought to be fixed from Chattanooga to that station, so that the rates will comply with Judge Severens' "scale of comparison between the dissimilarity of conditions and the disparity of rates.*" If the roads represented in said diagram were interstate roads, the Interstate Commerce Commission, prior to the Alabama Midland Ry. decision, would have reduced all of the rates from Chattanooga to the local stations between Cartersville and Atlanta down to the level of the Atlanta rate. In that case, there would have been no "*disparity* of rates," and consequently no use for a "scale of comparison between the dissimilarity of conditions and the disparity of rates." But since the decision in the Alabama Midland Ry. case, the competition at Atlanta would be recognized as constituting a substantial "dissimilarity of conditions;" and a "disparity of rates" would exist, to the extent of the difference between the new rate from Chattanooga to Atlanta, and the old rates from Chattanooga to the respective local stations on the W. & A. R.R. between Cartersville and Atlanta; and if Judge Severens' "scale of comparison" is of any value, *it ought to enable us to determine the precise amount of reduction that ought to be made in the rate to each of those stations.*

My contention is, that instead of attempting to use the theoretical and impracticable "scale of comparison" invented by Judge Severens, the Commission and the Court should determine from the testimony, First: Whether it would subserve the interest of the public as well as of the W. & A. R.R. Co., for the latter to compete at Atlanta, at the reduced rates offered by the new road; and Second: Whether the rates charged to Acworth and Marietta would have been regarded as just and reasonable if the new road had not been con-

structed; and if these two facts be decided in the affirmative, "the extent of the discrimination" *will determine itself*, and will amount exactly to whatever the difference may happen to be between the reasonable rates charged to Acworth and Marietta, the shorter distance points, and the lower rates forced by the competition of the new road at Atlanta, the longer distance point.

XXXV.

The Limitations which may Reasonably be Imposed Upon Carriers in the Exercise of Their Right to Take into Consideration Competition as One of the Circumstances and Conditions Affecting Transportation.

My contention concedes that carriers, in exercising the privilege of taking into consideration competition as one of the circumstances and conditions affecting transportation, must act within "reasonable limits."

In the case at bar I concede that the "reasonable limits" imposed upon the exercise of said privilege are three; each of which is eminently practical, and capable of judicial determination.

First: The rates charged by the appellants to Summerville, the shorter distance point, must not be unjust or unreasonable, within the purview of the first section of the Act, i. e., they must be such as would have been regarded as just and reasonable if lower rates were not charged to Charleston, the longer distance point.

Second: The competition at Charleston, the longer distance point, must be such as subserves the public interest. It must also be real; and such as to compel the acceptance by the appellants of the rates that are accepted by them at that point.

Third: The rates accepted by the appellants on traffic to

Charleston, the longer distance point, must yield some profit (though it may be very small) *over the additional cost of the movement of that traffic.*

Within the above limits, any rates which may be accepted by the appellants, upon traffic to Charleston, the longer distance point, are lawful.

The first limitation suggested by me concedes that the rates charged by the appellants to Summerville, the shorter distance point, must not be unjust or unreasonable; i. e., that they must be such rates as would be regarded as perfectly fair were it not for the fact that the appellants are charging less rates to Charleston, the longer distance point.

If the rates charged by the appellants to Summerville, the shorter distance point, are not just and reasonable they violate the first section of the Act; they must be condemned under that section; and there is no need to invoke the operation of either of the subsequent sections of the Act.

But if the rates charged by the appellants to Summerville, are just and reasonable (a question which I will consider hereafter under the first section of the Act), we have the case of a complaint made on behalf of certain persons at Summerville who are charged rates which are perfectly just and reasonable; and whose only real objection is that the appellants are charging less rates to Charleston, a longer distance point.

As said by Lord Curriehill, in Hozier vs. the Caledonian Ry. Co., their complaint "may be likened to that of the laborer, who, having worked all day, complained that others, who had worked much less, received a penny like himself."

1 Nev. & Mac., p. 32, Note 4; 1 Nev. & Mac., pp. 45–47, Jones vs. E. C. Ry. Co.; 2 Nev. & Mac., p. 202, Foreman et al. vs. Great Eastern Ry. Co.; 1 Nev. & Mac., pp. 97–108, Harris vs. Cockermouth, etc., Ry.; 1 Nev. & Mac., p. 120, Ransome vs. E. C. Ry. Co.

The Hozier case was cited by this Court in 145 U. S., p. 282, and in 162 U. S., p. 222.

The Jones case was cited by this Court in 145 U. S., p. 283.

The Foreman case was cited by this Court in 162 U. S., p. 222.

And the Harris case was cited by this Court in 162 U. S., pp. 223, 224.

If the rates to Summerville are just and reasonable (a question which I will hereafter consider under the first section), the appellants ought not to be required to reduce them, even though such reduction may be necessary to place Summerville upon a "rate equality" with Charleston; because such a reduction in rates to Summerville involves the same reduction in rates to all of the other local stations of the South Carolina and Georgia R. R., which would result in a serious reduction in the revenue which that railroad derives from the present rates to those stations.

The second limitation suggested by me concedes that the competition at Charleston, the longer distance point, must be such as subserves the public interests; that it must be real and not feigned or fraudulent; and that it must be effective, i. e., such as to compel the acceptance of the rates that are charged by the appellants to that point.

The third limitation suggested by me concedes that the rates accepted by the appellants on traffic to Charleston must yield some profit (though it may be very small) *over the additional cost of the movement of that traffic.*

If the competition at Charleston be real, and such as to affect rates, the appellants must accept those rates or abandon the competitive traffic.

If the rates to Charleston be so low as not to pay the additional cost of the movement of the Charleston traffic, the appellants ought not to be allowed to compete for it. It would not be to their interest to carry that traffic at a loss; and it would not be to the interest of the public for them to do so; because it would tempt the appellants to try to increase their local rates, in order to reimburse them for the loss sustained in carrying the Charleston traffic.

But if the competition at Charleston be real, and such as to affect rates; and if those rates pay something more than the additional cost of the movement of that traffic, it is to the interest of the appellants as well as to the interest of the public, that the appellants should be allowed to compete for the traffic. Whatever profit there may be in that traffic, increases, to that extent, the revenues of the appellants; and if there be a profit (however small), there is of course no *loss* to be reimbursed by increasing the local rates. On the contrary the local stations on the South Carolina and Georgia R. R. are benefited by allowing that railroad to participate in the Charleston traffic; because whatever profit may be realized from that traffic, (however small it may be,) has a tendency to reduce the local rates on that railroad and to improve its local service.

All three of the limitations suggested by me are entirely practical.

Though the question of the reasonableness of the rates to Summerville, the shorter distance point, involves (as is hereinafter shown) a very difficult problem; it is one which, upon proper evidence, is capable of judicial determination; and there are many cases in the Federal Jurisprudence, in which such questions have been determined by the courts.

It is also entirely practicable to determine whether the competition at Charleston, the longer distance point, subserves the public interest; whether it is real; and whether it is such as to affect rates.

It is also entirely practicable to ascertain whether the rates accepted by the appellants on traffic to Charleston, the longer distance point, yield a profit over the additional cost of the movement of that traffic. For while it is impossible to ascertain the cost of carrying any particular ton of freight, or any particular class of freight, it is entirely practicable to closely approximate how much the expenses of a railroad will be increased by moving a certain traffic, over and above what they would be, if that particular traffic were declined, and such increase represents what is called "*the additional cost of movement.*"

I submit that the practical limitations, which I have suggested, are far preferable to the theoretical "scale of comparison between the dissimilarity of conditions and the disparity of rates" suggested by Judge Severens.

XXXVI.

The Error of the Majority of the Court of Appeals in Holding that Competition Between Market and Market Cannot be Considered.

The following language is used in the majority opinion of the Court of Appeals:

"The appellees claim that the substantial dissimilarity in the circumstances and conditions under which they transport property from Memphis to Charleston, and from Memphis to Summerville, is created by: 1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston by all-water lines, or by all-rail lines, or part rail and part water routes. 2. The competition of all-rail lines between Memphis and Charleston." * * *

"Does the competition set up by the appellees as existing by water between Chicago and the North Atlantic ports, and the competition by rail between Memphis and Charleston, as also the competition of market with market, constitute substantial dissimilar circumstances and conditions within the meaning of the said fourth section of the act to regulate commerce?" * * *

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance, that in order to justify the greater charge for the shorter distance because of water competition, the transportation as to which such competition exists must be concerning freight to the longer distance point, which, if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for

the carriage of traffic from any particular locality, unless one line could perform the services if the other did not."

Trans., pp. 130–131.

The steamship rate on hay from Boston to Charleston, is 20 cents per 100 lbs. The steamship rate on hay from New York and Philadelphia, to Charleston, is 14 cents per 100 lbs.; and schooner rates can be obtained from New York to Charleston of 8 cents per 100 lbs. A lake, rail, and schooner rate of 16 cents per 100 lbs. can be obtained from Chicago to Charleston.

See Sections XIV and XV of this argument.

The rate from Memphis to Charleston on hay is 19 cents per 100 pounds.

See Section XVI of this argument.

Hay is shipped to Charleston from Chicago, Boston, New York, Philadelphia, and Baltimore, as well as from Memphis.

One of the defenses relied upon in this case is, that if the appellants charge a higher rate than 19 cents per 100 pounds from Memphis to Charleston, no hay would come over their roads; because the products of the "Eastern Hay Territory," and the "Chicago Hay Territory," would be delivered in Charleston, at rates which would exclude from the Charleston market the product of the "Memphis Hay Territory."

The Commission and the majority of the Court of Appeals held, in effect, that competition between market and market, or between product and product, cannot be considered as affecting the circumstances and conditions under which transportation is conducted.

In the case of Phipps vs. L. & N. W. Ry., Law Rep. (1892), 2 Q. B. 244, Lord Herschell said: "One class of cases unquestionably intended to be covered by the section, is that in which traffic from a distance of a character with the traffic nearer the market, is charged low rates, because unless such low rates were charged it would not come into the market at all. *It is certain unless some such principle as that were adopted, a large town would necessarily have its food supplies greatly raised in price.* So that, although the object of the company is simply

to get the traffic, the public have an interest in their getting the traffic *and allowing the carriage at a rate which will render that traffic possible*, and so bring the goods at a cheaper rate, and one which makes it possible for those at a greater distance from the market to compete with those situated nearer it."

In the case of I. C. C. vs. L. & N. R.R. Co., Judge Clark, holding the U. S. Circuit Court for the Middle District of Tennessee, said: "The public at large is greatly interested in competition, with the more favorable prices which it brings, *and for that purpose, in keeping open the larger markets of the country to all points of production and supply.*"

73 Fed. Rep., p. 420.

In the case of Texas & Pacific Ry. Co. vs. I. C. C., known as the "Import" case, Mr. Justice Shiras, speaking for the Supreme Court, said: "It could not readily be supposed that Congress intended, when regulating such commerce, to interfere with and interrupt, much less destroy, sources of trade and commerce already existing, nor to overlook the property rights of those who had invested money in the railroads of the country, *nor to disregard the interests of the consumers, to furnish whom with merchandise is one of the principal objects of all systems of transportation.*"

162 U. S., p. 211.

In the case of the Liverpool Corn Traders' Asso. vs. G. W. Ry Co., decided by the English Railway and Canal Commissioners in 1892, Mr. Justice Wills said: "To destroy the competition between the western ports and Liverpool, *would be to place the Midland markets more or less at the mercy of Liverpool*, and greatly to aggravate the consequences of those disturbances of trade which are continually taking place, whether by the failure of the sources of supply from which Liverpool draws its corn and grain, by difficulties in the labor market, either in the port or on the railway systems, or by any of the unforeseen circumstances which from time to time derange or cripple the trade of a particular district."

8 Ry. & Can. Traf. Cas., p. 120.

In this case, at Circuit, Judge Simonton found as a fact that "if the defendants had not consented with each other to lower

the rate, no hay whatever would come from the hay-producing territory tributary to Memphis, *and all the Southeastern States would be compelled to rely on other portions of the West, North and Northwest for hay.*"

Trans., p. 112.

The "Chicago Hay Territory," or the "Eastern Hay Territory," or both of them, may, at any time, be visited by drouths. The lake and canal route from Chicago may be frozen for months at a time.

Strikes of railroad employes, such as are described in *in re* Debs, 158 U. S., p. 564; or strikes of draymen and workingmen such as are described in U. S. vs. Workingmen's, etc., 54 Fed. Rep., p. 994, may occur at any time at Chicago, at New York, or at any of the Eastern cities from which hay is shipped to Charleston. Congress never intended that "all the Southeastern States" should be "compelled to rely" on any particular city, or territory, for their supply of an article so important as hay.

It will be impossible to keep Charleston and "all the Southeastern States" open "*to all points of production and supply*" (to use the language of Judge Clark), unless the appellants, whose lines run from Memphis, are allowed to carry hay (to use the language of Lord Herschell) "*at a rate which will render that traffic possible.*" And, as found by Judge Simonton, the Memphis traffic will be rendered *im*possible, if the appellants are forced to raise their rates to Charleston, so as to make them as high as their rates to Summerville.

It is *the fact* of competition, and not *the kind* of competition, that constitutes the substantial dissimilarity in circumstances and conditions.

The Hudson River Railroad runs up the eastern shore of the Hudson River, from New York to Albany. The West Shore Railroad runs up the western shore of that river, from Jersey City to Albany.

According to the theory of the Commission, and the majority of the Court of Appeals, each road may compete for

traffic against other lines on its own side of the river; but neither of them can do anything to promote the traffic upon its own side of the river, in competition with the traffic upon the other side of the river. In other words, New York railroads may compete with New York railroads, and Jersey City railroads may compete with Jersey City railroads; but New York railroads must not compete with Jersey City railroads.

Such refinements may be interesting, but they cannot properly find a place in the construction of a statute intended for the practical administration of the most important commercial interests of the country.

As a matter of fact, the competition "between market and market," is nothing more than competition between the carriers by which those markets are respectively served; and competition between product and product, is nothing more than competition between the carriers by which those products are respectively transported.

Neither markets, nor products, can compete, except by means of their respective carriers.

The Commission, itself, admits that "the strife for trade between different markets seeking transportation for *like* commodities to the same localities is undoubtedly *one of the most potent commercial forces of our time.*

4 I. C. Rep., p. 149, left col. Trammell et al. vs. Clyde S. S. Co. et al.

It is judicially known to the Court that Boston, New York, Philadelphia, and Baltimore are competing markets in the East for the traffic to Chicago and the West.

For twenty years or more the rates from Boston to Western competitive points have been the same as from New York. From Philadelphia and Baltimore the rates are "agreed differentials"—less than New York—the Baltimore rates being also lower than Philadelphia rates. When the rates from New York to Western points are changed, like changes have to be made from Boston, Philadelphia, and Baltimore; the "differ-

entials" as between the Eastern cities being at all times maintained.

Wholesale Prices, Wages, and Transportation, Senate Rep. No. 1394, 2d Sess., 52d Con. Part 1, pp. 429-430.

The Commission has recently considered the matter of said differentials on grain, &c., and refused to disturb them.

7. I. C. Rep., p. 613, N. Y. Produce Exchange vs. B. & O. R.R.

The mere fact that such "differentials" have existed for more than 20 years is, of itself, a recognition of "competition between markets."

If Boston, New York, Philadelphia, and Baltimore have the right to compete with each other, on agreed differentials for traffic to Chicago and the West, they have the right to compete with each other for traffic to Charleston and the South.

If Boston, New York, Philadelphia, and Baltimore have the right to compete with each other for traffic to Charleston, Chicago and Memphis have the right to compete with each other and with Boston, New York, Philadelphia, and Baltimore for traffic to Charleston; and the appellant lines from Memphis have the right to accept such rates to Charleston, as will enable them to participate in the Charleston traffic.

XXXVII.

The Error of the Majority of the Court of Appeals and the Commission in Holding that the Competition of One Line Cannot be said to meet that of Another, unless One of the Lines could perform the Service if the Other did not.

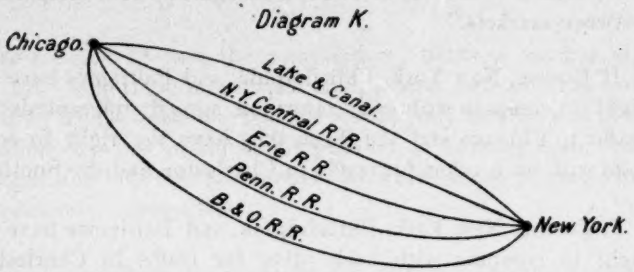
The following language is used in the majority opinion of the Court of Appeals:

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance,

* * * that the competition of one transportation line cannot be said to meet that of another for the carriage of traffic from any particular locality, unless one line could perform the service if the other did not."

Trans., p. 131.

The following diagram "K" represents the principal competing transportation lines, which operate between Chicago and New York. The lake-and-canal route is an all-water line. The other routes are all-rail lines, viz: The N. Y. Central R.R., Erie R.R.; Penn. R.R., and B. & O. R.R.



One of the propositions involved in the extract above quoted is that the competition of the lake and canal all-water line cannot be said to meet that of the four all-rail lines for the carriage of traffic between Chicago and New York, unless said lake-and-canal line could carry all of the traffic passing between Chicago and New York, if the four all-rail lines should cease to compete for it.

I submit, however, that it is not necessary to show that a transportation line is capable of carrying *all* the traffic that passes between its termini.

The Erie Canal is only a little over 300 miles long, and yet Mr. Albert Fink, who was one of the most eminent authorities on the subject of railway transportation, testified before a special committee of the New York Legislature, that "the Erie Canal regulates the freight rates on all the railroads east of the Mississippi River, not only on those whose tracks run parallel with the canal but upon those wich run in an opposite direction."

Mr. Fink's statement is strongly fortified by the report (1891) of Hon. Edward Hannan, Superintendent of Public Works of New York.

Of the 110,812,000 bushels of wheat received in the city of New York during the year covered by that report, only a little over one-fourth—30,846,641 bushels—was delivered through the canal; nevertheless, the canal cheapened the rates on the entire aggregate of receipts—the 80,000,000 bushels received by the railroads, as well as the 30,000,000 bushels received by the canal. This saving amounted to over $4,000,000 in freight charges on wheat alone that went into New York city during that year; to say nothing of the five times greater weight of other freight which went into and out of that city.

See Memorial to 52d Congress of the U. S., in favor of the Improvement of the Navigation of the Mississippi River. St. Louis, 1892, pp. 19, 20.

"The fact that the chief part of our transportation of traffic is performed by railroads, which, in some cases, have taken away one-half, or three-fourths of the business, once performed by navigable streams, does not prove that navigable streams have had their day and gone out of use, and that water carriage has become, or is about to become obsolete; it proves only that the country has grown so great in population, wealth, and diversified interests, that it requires both railroads and rivers to meet the demands of its enormous interchange, and we could not dispense with either."

See said Memorial, p. 15.

"Before the jetties were constructed, the shipments of grain from St. Louis to New Orleans for export to Europe were only about 500,000 bushels a year; now they are 18,000,000 bushels a year, and steadily increasing."

See said Memorial, p. 33.

Not more than one-fifth of the freight carried into and out of New York from and to the interior passes through the Erie Canal, and yet that small waterway "has cheapened the cost of carrying on the entire traffic with the West, to the amount of millions—indeed, it might be said, hundreds of millions, in the last twenty years."

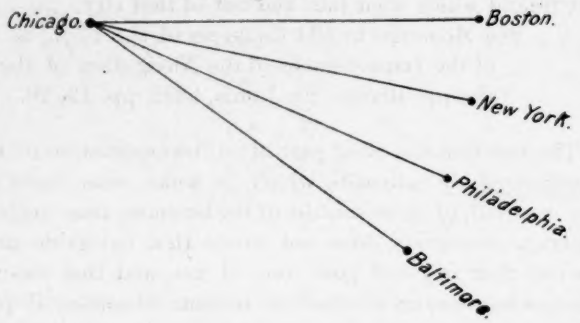
See said Memorial, p. 37.

It is said that in England sea competition affects three-fifths of all the station rates in that country; and yet it is probable that not one one-hundredth of the railroad stations in England are located on the sea.

Acworth on Railways, etc., p. 85, note.

Another proposition involved in the extract quoted from the majority opinion of the Court of Appeals at the head of this section, is illustrated by the following diagram L, which represents the transportation lines running between Boston, New York, Philadelphia, and Baltimore, respectively, and Chicago.

Diagram L.



It is quite evident that a line which runs only between Boston and Chicago cannot carry traffic between Chicago and New York; that a line which runs only between Chicago and New York cannot carry traffic between Chicago and Philadelphia; that a line which runs only between Chicago and Philadelphia cannot carry traffic between Chicago and Baltimore; and yet the Court judicially knows that the competition of the lines between Boston and Chicago has for more than twenty years met the competition of the lines between Chicago and New York, as well as of the lines between Chicago and Philadelphia, and of the lines between Chicago and Baltimore. It is because of the fact that the lines running from Boston, New York, Philadelphia, and Baltimore, respectively, to Chicago, meet the competition of each other most effectively, that it has been found necessary, in establishing rates from the East to Chicago, to make the rates from Boston and New York the same, and the rates from Philadelphia and Baltimore certain

"agreed differentials" less than the rates from Boston and New York.

I have heretofore, in section XXXVI of this argument, explained why it is necessary to fix certain relative rates from Boston, New York, Philadelphia, and Baltimore, respectively, to Chicago and the West.

I have shown in section X of this argument that there are three hay-producing territories from which Charleston can be, and is, supplied with hay. One of those territories is represented by Boston, New York, Philadelphia, and Baltimore, as shipping points; another is represented by Chicago, and another by Memphis.

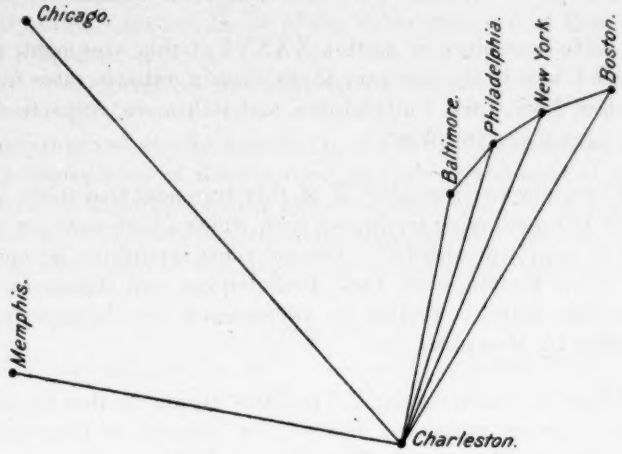
I have shown in section XVI of this argument that the fact as to whether grain and hay will be shipped to Charleston from Boston, New York, Philadelphia, Baltimore, Chicago, or Memphis, depends entirely upon two facts:

First. The price of hay at Boston, New York, Philadelphia, Baltimore, Chicago, and Memphis, respectively, and

Second. The rates on grain and hay from those points respectively to Charleston.

If the price were the same in all six of said markets, viz: Boston, New York, Philadelphia, Baltimore, Chicago, and Memphis, grain and hay would be shipped from that one of those cities which has the lowest rate to Charleston. The city having the lowest rate would have a monopoly of the grain and hay traffic at Charleston, and the transportation lines leading from the other five cities to Charleston would get none of that traffic to carry. It follows that it is absolutely necessary that the lines leading from any one of those six cities to Charleston shall meet the competition of the lines running from every other one of said cities to Charleston; or the lines failing to meet such competition, must abandon the competitive traffic. The competitive situation just referred to is illustrated by the following diagram M.

Diagram M.



XXXVIII.

The Error of the Majority of the Court of Appeals that Competition Between Markets does not Affect Rates from a Particular Locality.

The following language is used in the opinion of the majority of the Court of Appeals:

"We are also of opinion that the competition claimed by the appellees to exist between the different markets—particularly those of Memphis, Chicago, and the North Atlantic ports—to supply the trade of Charleston in the products mentioned, is not in reality the competition that affects rates from a particular locality, but is one that is regulated by the commercial circumstances existing at those points, applicable to business of that character, and not connected with the usual conditions under which transportation is conducted, nor does such competition in our judgment create the dissimilar circumstances and conditions referred to in the fourth section of the Act now under consideration."

Trans., pp. 131, 132.

It is manifest that the competition between Boston, New York, Philadelphia, and Baltimore is competition "that affects rates from a particular locality." The competition between those Eastern cities "affects rates" from each of those localities to Chicago. Said competition not only "affects," but it absolutely controls said rates.

And so the competition between New York, Boston, Philadelphia, Baltimore, Chicago, and Memphis for the grain and hay traffic to Charleston and the South is competition "that affects rates from a particular locality."

The competition between New York, Boston, Philadelphia, Baltimore, Chicago, and Memphis "affects rates" from each of those localities to Charleston. Said competition not only "affects," but it absolutely controls said rates; because if the purchase price of grain and hay be the same in New York, Boston, Philadelphia, Baltimore, Chicago, and Memphis, then the rates from those cities respectively to Charleston will not only affect, but absolutely control the question as to which of those cities is to supply the Charleston market.

It is true that the competition referred to is regulated to the extent of the purchase price of grain and hay by "the commercial circumstances" existing at New York, Boston, Philadelphia, Baltimore, Chicago, and Memphis respectively; because the purchase price of grain and hay is one of "the commercial circumstances" existing at those points. But it is a serious error to say that the purchase price of an article which is offered for transportation is "not connected with the usual conditions under which transportation is conducted." The contrary is obviously true; and especially with reference to grain, hay, and other low-class traffic, the freight rate upon which constitutes a material portion of the selling price at point of destination.

Before any of such articles can move, the consignor must ascertain three facts:

First: The price at which the article can be purchased or produced at the point of shipment.

Second: The rate of freight from point of shipment to the point of destination; and

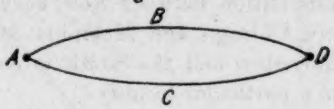
Third: The price at which the article can be sold at the point of destination.

Whether the competition be between two lines, which extend from the same point of shipment, to the same point of destination, or between two or more lines, which extend from different

points of shipment to the same point of destination, is wholly immaterial. The three facts above mentioned are as necessary to be ascertained in the one case, as in the other.

Take the case illustrated by the following diagram "N."

Diagram N.



The two competing lines A-B-D, and A-C-D, extend from the same point of shipment (A) to the same point of destination (D).

No intelligent merchant would undertake to ship grain or hay, or any other low-class article, from A to D, without ascertaining:

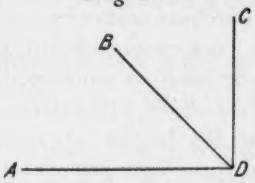
First: The price at which the article can be purchased or produced at A.

Second: The rate of freight from A to D; and

Third: The price at which the article can be sold at D.

Now take the case illustrated by the following diagram O:

Diagram O.



The three competing lines A–D, and B–D and C–D extend from different points of shipment, (A), (B), and (C), to the same point of destination, (D).

No intelligent merchant would undertake to ship grain or hay, or any other low-class article, from either A, or B, or C, to D, without ascertaining:

First: The price at which the article can be purchased or produced at each of the points of shipment (A), (B) and (C).

Second: The rate of freight from each of said points of shipment to (D); and

Third: The price at which the article can be sold at (D).

Now if the competition between the two lines A–B–D and A–C–D shown in Diagram N, may be considered, as it was held by this Court in the Alabama Midland Railway case, then why cannot the competition between the lines A–B, and B–D, and C–D, shown in Diagram O, be considered? It is certainly as important for those three lines to be allowed to compete at D, as it is for the two lines shown in Diagram N, to be allowed to compete there; and it is as important that the cities B and C should be allowed to compete in the market D, as it is that A should be allowed to compete there.

If the competition between the lines A–B–D and A–C–D shown in Diagram N may, as held by this Court in the Alabama Midland case, "create the dissimilar circumstances and conditions referred to in the fourth section of the Act," why is it that the competition between the lines A–D, and B–D, and C–D, shown in Diagram O, may not create the dissimilar circumstances and conditions referred to in that section?

XXXIX.

The Error of the Majority of the Court of Appeals in Supposing that Carriers Claim the Right to Determine for Themselves Whether the Circumstances and Conditions Justify a Greater Charge for the Shorter Than for the Longer Haul.

The following language is used in the opinion of the majority of the Court of Appeals:

"If the carriers were permitted to *determine* such questions, the conflicting results produced by opposing interests would not only cause confusion, but work great injury in many cases to shippers, to localities, and also to certain lines of business, that would be affected thereby."

Trans., p. 132.

Carriers do not claim the right to *determine* such questions. On the contrary, they concede that their judgment on every

such question is fully open to review by the Commission, as well as by the court.

The long and short haul clause has no application, unless the circumstances and conditions are substantially similar.

Carriers must necessarily judge for themselves *in the first instance* whether the circumstances and conditions are or are not substantially similar; but in so doing, they act at their peril, and with knowledge that their judgment is subject to review.

If the Commission or the Court should approve the judgment of the carrier, and hold that the circumstances and conditions are not substantially similar, no injury would result either to "shippers," "localities" or "lines of business;" because no violation of the law would, in such case, be committed.

If, on the other hand, the Commission and the court should disapprove the judgment of the carrier, and hold that the circumstances and conditions are substantially dissimilar, the carrier would be enjoined from charging more for a shorter than for a longer haul; and the matter would be ended. The "questions" involved in such a case are plain commercial questions, dependent upon facts, open to every one, and the tentative judgment formed by the carrier in the first instance is easily re-examined by the Commission and by the court.

XL.

The Error of the Majority of the Court of Appeals in Supposing that if Carriers be Allowed to Take Competition Into Consideration, it Will Result in Unjust Rates.

The following language is used in the majority opinion of the Court of Appeals:

"If the competition of markets, *or of carrying lines, subject to the provisions of the commerce act*, justify carriers in making greater short-haul and lower long-haul charges, over the same line, without an order from the Commission, issued after due investigation, then the unjust rates for transportation existing when that law was enacted, and which it was intended should

be prohibited by it, will continue to be imposed and collected and schedules shall be made, announced, and maintained, to the prejudice of some localities and in favor of others, to the destruction of some shippers and to the profit of others."

Trans., p. 132.

This Court has held in the Alabama Midland Ry. case, that under certain circumstances, the competition of "carrying lines, *subject to the provisions of the commerce act*," may "justify carriers in making greater short-haul and lower long-haul charges, over the same line, without an order from the Commission;" and yet I have never heard that the decision of this Court, in that regard, has resulted in establishing "unjust rates," or rates which operated "to the prejudice of some localities and in favor of others," or "to the destruction of some shippers and to the profit of others."

And if competition between carrying lines, subject to the provisions of the commerce act, has not produced any of the direful results, predicted by the majority of the Court of Appeals, I cannot see why competition of carrying lines, which serve different competing markets should have that effect.

The fourth section of the commerce act does not prohibit a greater charge for a shorter than for a longer haul in any case, except where the circumstances and conditions are substantially similar; and if the competition be such as that it may properly be taken into consideration, and if, when taken into consideration, it renders the circumstances and conditions substantially *dis*similar, the lower charge for the shorter haul is not prohibited by the law; and therefore it cannot produce any of the illegal and injurious results denounced by the majority of the Court of Appeals.

It is proper at this point to inquire how an order issued by the Commission, after due investigation, could obviate the evil consequences referred to by the Court? If "making greater short-haul and lower long-haul charges over the same line" will result in "unjust rates for transportation" to "the prejudice of some localities and in favor of others, to the destruction of some shippers and to the profit of others," it will do so as well when authorized by the Commission, as when it is not. Surely, a mere relieving order issued by the Commission cannot change the commercial results of any set of rates that may be promulgated under it.

At all events, it was a question for Congress to determine; and Congress saw proper to enact that unless the circumstances and conditions are substantially similar, no application to the Commission for relief is necessary.

XLI.

The Error of the Majority of the Court of Appeals in Holding that the Commission Found the Facts Against the Appellants.

The following language is used in the majority opinion of the Court of Appeals:

"The appellees alleged both before the Commission and the court below, such substantial dissimilarity of circumstances and conditions as justified them in making the greater charge for the shorter haul complained of in the petition, and upon them was the burden of showing affirmatively that such circumstances and conditions were, in fact, substantially dissimilar. The Commission, in ascertaining the facts, *found against this claim* of the railroad companies and entered the order, the enforcement of which was the object of the petition filed by the appellant."

Trans., p. 130.

It is true that the Commission found against "*the claim*" of the railroad companies; but it did not find against *the facts* which were averred by said companies in support of that claim.

"*The claim*" of said companies, as stated both by the Commission, and by the majority of the Court of Appeals, was:

"That the substantial dissimilarity in the circumstances and conditions under which they transport property from Memphis to Charleston and from Memphis to Summerville is created by:

"1. The competition of various markets for the trade of Charleston, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points which can reach Charleston

by all-water lines, or by all-rail lines, or part rail and part water routes.

"2. The competition of all-rail lines between Memphis and Charleston."

Trans., pp. 130–131, p. 21.

It is true that the Commission found against said "claim;" but its finding was based on matter of law, *and not on matter of fact.*

To illustrate my meaning:

1. The companies averred *as matter of fact* that there was competition of various markets, such as New York, Boston, Philadelphia, Baltimore, Chicago, and other points, for the trade of Charleston.

The Commission did not find that fact to be untrue; but held, in effect, that it was, *as matter of law*, irrelevant; because "competition of markets" could not be considered.

Trans., p. 22.

2. The companies averred *as matter of fact* that there were various all-water lines, all-rail lines, and part rail and part water routes, extending from New York, Boston, Philadelphia, Baltimore, Chicago, and other points, which competed with said companies in the carriage of hay to Charleston.

The Commission did not find that fact to be untrue; but held that it was, as matter of law, irrelevant; because the competition of no line could be considered that did not reach Memphis.

Trans., pp. 21–22.

3. The companies averred *as matter of fact* that there were various all-rail lines which actively competed for the carriage of hay from Memphis to Charleston.

The Commission did not find that fact to be untrue; but held, in effect, that it was, *as matter of law*, irrelevant; because all of said rail lines were subject to the Act to Regulate Commerce.

Trans., p. 21.

I insist that the failure of the Commission to find *the facts*, renders its order in this case illegal; and therefore, that it was error in the Court of Appeals to order its enforcement.

In the case of The Interstate Commerce Commission vs. Louisville & Nashville R.R. Co., in the U. S. Circuit Court for the Middle District of Tennessee, Judge Clark, in speaking of the report which the Commission is required by law to make, said:

"It is not sufficient, therefore, in a report of its findings of fact and conclusions, to do so in such general way as not to disclose its views upon particular phases of the evidence, or its conclusions of law upon facts found with reference to the particular issues in the case. Stated in another form, it is not sufficient for the report to be made up of mere conclusions with respect either to law or fact. Its opinion or report should show what the issues in the case are, *and what facts it finds* in regard to such issues. The report should make suitable reference to the evidence adduced in regard to any particular question, where there is a conflict in the proof, showing how the Commission settles the disputed fact; or if the evidence in regard to any issue is undisputed, state that fact. *In other words, the report should give the parties to be affected, as well as the Court, in any judicial proceeding afterward instituted, definite and distinct information as to what was found as facts,* and the Commission's opinion thereon, such as would be necessary to make a judicial opinion sufficient and satisfactory for the purpose of ordinary litigation."

73 Fed. Rep., p. 414, 415.

In Section II of this argument, I have enumerated seven distinct and important facts which were averred in the answers filed before the Commission; and which facts were relied upon before the Commission as those which constituted the legal defence in this case; and yet the Commission would not find and report whether those basic facts are or are not true.

XLII.

The Error of the Majority of the Court of Appeals as to the Force and Effect of Certain Competition Shown in this Case.

The following language is used in the majority opinion of the Court of Appeals:

"Does the competition set up by the appellees as existing by water between Chicago and the North Atlantic ports, and the competition by rail between Memphis and Charleston, as also the competition of market with market, constitute substantial dissimilar circumstances and conditions within the meaning of the said fourth section of the act to regulate commerce? Did such competition in fact *affect rates between Chicago, the North Atlantic ports, and Charleston?* We are of the opinion that it was not of *controlling* force; and that it was not such *effectual* competition as would constitute the dissimilar circumstances and conditions *which would justify the Commission, upon application to it, in authorizing the carrier to charge less for the longer than for the shorter haul.*"

Trans., p. 131.

There are two singular errors contained in the language just quoted.

1. The question is asked, "Did such competition in fact affect rates *between Chicago, the North Atlantic ports and Charleston?*" There was no such question in the case. The only question was whether said competition affects rates *between Memphis and Charleston.*

2. The Court says that said competition would not constitute such dissimilar circumstances or conditions as would justify the Commission, upon application, to authorize the carrier to charge less for the longer than for the shorter haul.

Now, the fourth section vests the power in the Commission to authorize such a charge, even though there be no dissimilarity whatever in the circumstances or conditions.

The Commission evidently supposed that it had the power to authorize the carriers in this case to charge less for the longer than for the shorter haul.

Trans., p. 22-23.

I suppose it will be contended by counsel for appellee that the language above quoted contains a *lapsus linguæ;* that the majority of the Court of Appeals intended to say that the competition was not such as to affect rates *between Memphis*

and Charleston; and that it was not such as to authorize the carriers to charge less for the longer than for the shorter haul *in advance* of an application to the Commission for permission to do so.

I do not think that the majority of the Court of Appeals intended to find as a fact that the competition referred to did not *as a fact* compel the appellants to accept the low rates which are charged to Charleston; because such a finding would be contrary to the overwhelming weight of the testimony. There is absolutely no testimony to explain why the appellants accept the low rates to Charleston, except that they are forced to do so by the competition between themselves, and the competition between them and the lines from Chicago, New York, Boston, Philadelphia, Baltimore, etc., to Charleston.

It seems to me that the majority of the Court of Appeals did not intend to decide any question of *unmixed fact;* and that the most that it did intend to do was to decide certain questions of *mixed law and fact.* In other words, all that it intended to do was to decide that even if the facts were as averred and proven by the appellants, they did not in law constitute a justification.

When the Court said that certain competition does not "in fact affect rates between Chicago, the North Atlantic ports, and Charleston," it only meant to say that the rates were not in fact affected *in contemplation of law.*

So, when the Court said that certain competition was "not of controlling force," it only meant that *in legal contemplation,* the competition was not "controlling."

I am borne out in this suggestion by the following language which immediately succeeds that which is quoted above at the head of this section. The majority of the Court say:

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance, that in order to justify the greater charge for the shorter distance, because of water competition, the transportation as to which such competition exists must be concerning freight to the

longer distance point, which if not carried to such point by the road giving the rate complained of, could reach that point by water transportation; and also that the competition of one transportation line cannot be said to meet that of another for the carriage from any particular locality, unless one line could perform the service if the other did not."

Trans., p. 131.

XLIII.

The Error of the Majority of the Court of Appeals in Holding that Nothing but Water Competition can be Considered.

The following language is used in the majority opinion of the Court of Appeals:

"We adopt the conclusion heretofore announced by the Interstate Commerce Commission, which is, in substance, that in order to justify the greater charge for the shorter distance, because of water competition, the transportation as to which such competition exists must be concerning freight to the longer distance point, which, if not carried to such point by the road giving the rate complained of, *could reach that point by water transportation;* etc.".

In section XIII of this argument, I have enumerated four all-rail lines, which with their connections actually compete for the transportation of hay and other traffic from Memphis to Charleston. There was no proof however, that hay or other traffic could reach Charleston from Memphis, by *water* transportation. It was conceded that all of the rail lines competing between Memphis and Charleston were subject to the Act to Regulate Commerce, and inasmuch as no water competition could be shown between *Memphis* and Charleston, the majority of the Court of Appeals and the Commission held that the competition between said all-rail lines could not be considered. The decision of the Commission as well as that of the majority of the Court of Appeals, in this case, was rendered before the case of the Interstate Commerce Commission vs. Alabama

Midland Railway Co. was decided by this Court, in which it was held that competition between all-rail lines, even though they be subject to the Act to Regulate Commerce, may be considered.

168 U. S., pp. 164, 169.
I. C. C. vs. Alabama Midland Ry. Co.

XLIV.

The Order Made by the Commission in This Case is Not Lawful Under the Third Section of the Act.

Though the Commission may have erred in basing the order made by it in this case on the fourth section, yet if said order is lawful under the third section (which I deny), the Court has power to enforce it.

Though the circumstances and conditions at Charleston may be substantially dissimilar from those at Summerville, and though such dissimilarity may take the case out of the operation of the fourth section, the third section remains; and if it can be shown that the disparity in rates constitutes an *undue* preference of Charleston, the rates may be declared to be unlawful. But before a violation of the third section can be established, it must be shown that the disparity of rates, as between Charleston and Summerville, however considerable it may be, constitutes not only a preference, but an *undue* preference in favor of Charleston.

The third section of the Act to Regulate Commerce was modeled upon the second section of the English Railway and Canal Traffic Act of 1854, and upon section 11 of the English Railway and Canal Traffic Act of 1873. For the convenience of the Court, I print in parallel columns so much of said sections as are material for the present purpose:

Undue Preference Clause.	Undue Preference Clause.
English Act.	*American Act.*
Sec. 2. Railway and Canal Traffic Act, 1854.—1 *Nev. & Mac., p.* 2.	Sec. 3. Act to Regulate Commerce.
Sec. 11. Railway and Canal Traffic Act, 1873.—1 *Nev. & Mac., p.* 11.	That it shall be unlawful for any common carrier subject to the pro-

. . . . . And no such company shall make or give any *undue* or *unreasonable* preference or advantage to or in favor of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever. —1 *Nev. & Mac., pp.* 2-11.

visions of this Act to make or give any *undue* or *unreasonable* preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any *undue* or *unreasonable* prejudice or disadvantage in any respect whatsoever.—24 U. S. *Stat. at Large, p.* 380.

XLV.

Only Such Discriminations or Preferences as are Unjust or Unreasonable are Prohibited.

In the case of Interstate Commerce Commission vs. Baltimore & Ohio Railroad Co., Mr. Justice Brown, speaking for this Court, said:

"It is not all discriminations or preferences that fall within the inhibition of the statute; *only such as are unjust or unreasonable.*" . . . "Indeed, the possibility of just discriminations and reasonable preferences is recognized by these sections, in declaring what shall be deemed unjust."

145 U. S., pp. 276, 277, I. C. C. vs. B. & O. R. R.

In the case of Interstate Commerce Commission vs. Alabama Midland Railway Co., Judge Bruce said:

"The words 'any undue or unreasonable preference or advantage' plainly imply that every preference or advantage is not condemned, *but such, only, as are undue or unreasonable.*"

69 Fed. Rep., pp. 231, 232.

In the case of the Commercial Club of Omaha vs. Chicago & N. R. Co., decided November 18, 1897, the Commission, speaking through Commissioner Knapp, said:

"It must be remembered that not every inequality in rates constitutes a violation of the law. *Discrimination is forbidden*

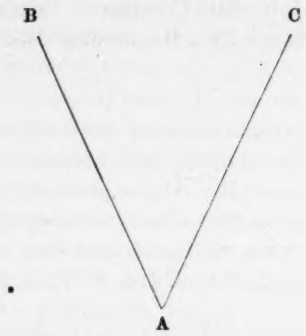
only when it is unjust. Preferences and prejudices are not prohibited unless they are undue. The language of the statute implies that there may be discriminations which are not unjust and preferences which are not undue."

7 I. C. Rep., p. 404.

It goes without saying that where lower rates are charged to one city than to another, and those cities are competitors in a common territory, such disparity of rates constitutes a preference in favor of the one, and a prejudice or discrimination as against the other.

But the question still remains whether the preference, or prejudice, or discrimination is *undue or unjust.*

DIAGRAM NO. 4.



In the above diagram, suppose A–C to represent a railroad owned by one company, and A–B to represent a railroad owned by a different company. Suppose B and C are cities which compete in the territory which lies between them. If the company owning the railroad A–C puts in a line of rates on traffic from A to C materially lower than the company owning the other railroad charges on traffic from A to B, such a disparity of rates will constitute a preference in favor of C and a prejudice or discrimination against B; because it will enable C to compete at an advantage over B in the territory which lies between them. But such preference or prejudice is not *undue* or *unjust.*

Merchants at B would have no ground of complaint against the line A–C, because it carries no traffic to or from B.

4 I. C. Rep., p. 65, Eau Claire Board of Trade vs. C. M. & St. P. Ry. et al., 4th head note.

Nor would merchants at B have any complaint against the line A–B, because the reduction in rates on traffic from A to C, which alone created the disparity of rates, was not made by the line A–B, but by the line A–C, over which the line A–B has no control. Even if the same company owned both lines, the mere fact that it made a material reduction in the rates on traffic from A to C would not of itself establish the fact that the preference in favor of C was *undue*, or that the prejudice or discrimination against B was *unjust*. The competition existing at C might compel the company to accept on traffic from A to F, rates much lower than it otherwise might reasonably charge.

XLVI.

Competition is Entitled to be Taken into Consideration Under the Third Section, as well as Under the Fourth Section of the Act.

In the case of Texas & Pacific Ry. vs. I. C. C., 162 U. S., p. 232, this Court quote approvingly the following statement made by Jackson, Circuit Judge, in the case of I. C. C. vs. B. & O. R. R. Co., 43 Fed. Rep., p. 53:

"The English cases establish the rule that, *in passing upon the question of undue or unreasonable preference or disadvantage*, it is not only legitimate, but proper, to take into consideration, besides the mere differences in charges, various elements, such as the convenience of the public, the fair interests of the carrier, the relative quantities or volume of the traffic involved, the relative cost of the services and profit to the Company, and the situation and circumstances of the respective customers with reference to each other as *competitive* or otherwise."

162 U. S., p. 232, Tex. & Pac. Ry. vs. I. C. C.

In the same case, this Court in discussing the third section says:

"In passing upon questions arising under the Act, the tribunal appointed to enforce its provisions, whether the Commission or the courts, is empowered to fully consider all the circumstances and conditions that reasonably apply to the situation, and that, in the exercise of its jurisdiction, the tribunal may and should consider the legitimate interests as well of the carrying companies as of the traders and shippers, *and in considering whether any particular locality is subjected to an undue preference or disadvantage*, the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment. That among the circumstances and conditions to be considered, as well in the case of traffic originating in foreign ports as in the case of traffic originating within the limits of the United States, *competition that affects rates should be considered*, and in deciding whether rates and charges made at a low rate to secure foreign freights which would otherwise go by other competitive routes are or are not *undue and unjust*, the fair interests of the carrier companies and the welfare of the community which is to receive and consume the commodities are to be considered," etc.

162 U. S., pp. 233, 231, Tex. & Pac. Ry. vs. I. C. C.

In the case just referred to, the "competitive" routes were either all-water lines from Liverpool, via Cape Horn, to San Francisco; or water and rail lines from Liverpool, via the Isthmus of Panama, to San Francisco; or water and rail lines from Liverpool to various Atlantic and Gulf ports in the United States, and thence to San Francisco. One of the questions argued in that case was, whether either of said "competitive routes" was "subject to the Act to Regulate Commerce;" and the Commission declined to recognize that case as deciding that competition between carriers which are "subject to the Act to Regulate Commerce" can be considered in determining whether a certain preference or advantage is undue or unjust. That question was definitely settled by this Court in the subsequent case of the Interstate Commerce Commission vs. Alabama Midland Ry. Co., 168 U. S., pp. 164, 167.

Though, as conceded in Section XLIV of this argument, it is competent for the court in this case to determine whether the disparity in rates between Charleston and Summerville constitutes an *undue* preference of Charleston within the purview of the third section, yet under the cases just cited, I contend that the competition existing at Charleston is entitled to precisely the same consideration under the third section, as it is under the fourth section of the Act.

In the case of I. C. C. vs. C. N. O. & T. P. Ry. Co. (known as the Social Circle Case), Newman, J., said:

"*As to the question of undue preference, under section* 3 of the Act to Regulate Commerce, it may be stated that, unless the traffic involved here is obnoxious to the fourth clause of the Act, it can hardly be said to be an *undue* preference in favor of Augusta (the longer distance point), or an *undue* prejudice or disadvantage against Social Circle (the shorter distance point). In the Party Rate Case (Interstate Commerce Commission vs. Baltimore & Ohio R. R. Co., 145 U. S., 263, 12 Sup. Ct. Rep., 844), the Supreme Court says:

'But, so far as relates to the question of "undue preference" it may be presumed that Congress, in adopting the language of the English Act, had in mind the constructions given to these words by the English Courts, and intended to incorporate them into the statute. . . . In short, the substance of all these decisions is that railway companies are only bound to give the same terms to all persons alike, under the same conditions and circumstances, and that any fact which produces an inequality of condition, and a change of circumstances, justifies an inequality of charge.'

"So that unless the rates complained of, as compared with each other, violate the fourth section of the Act, there seems to be very little ground for claiming that they violate the 'undue preference' provisions of the third section."

56 Fed. Rep., 947, 948.

XLVII.

The mere fact of Competition does not Relieve a Carrier; but Competition that Affects Rates and Subserves the Public Interest may do so.

Counsel for appellee may refer to the following language used by this Court in the Alabama Midland Railway case, viz:

"In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the *mere* fact of competition, *no matter what its character or extent*, necessarily relieves the carrier from the restraints of the third and fourth sections," etc.

168 U. S., 167.

I do not contend "that the *mere* fact of competition, no matter what its character or extent," necessarily "relieves the carrier from the restraints of the third and fourth sections." My only contention is, that "competition *that affects rates* should be considered." And that proposition has been decided by this Court, both in the case of the Texas & Pacific Ry. vs. I. C. C., 162 U. S., 233; and in the case of I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., p. 166.

Counsel for appellee may also refer to the following language from the opinion of this Court in the Alabama Midland Railway case, viz:

"The competition may, in some cases, be such as, *having due regard to the interests of the public and of the carrier*, ought justly to have effect upon the rates, and in such cases there is no absolute rule which prevents the Commission or the courts from taking that matter into consideration."

168 U. S., p. 167.

I contend that the competition at Charleston "ought justly to have effect upon the rates," if we are to have due "regard to the interests of the public."

As said by this Court in 168 U. S., pp. 165-166, and in 162 U. S., pp. 233–234, "the welfare of the communities occupying the localities where the goods are delivered is to be considered as well as that of the communities which are in the locality of the place of shipment."

The "places of shipment" include Memphis, Chicago, Boston, New York, Philadelphia, and Baltimore. The communities occupying the localities where the goods are "delivered," include the community at Charleston, as well as the community at Summerville.

The welfare of Memphis, Chicago, Boston, New York, Philadelphia, and Baltimore, and the welfare of Charleston are to be considered, as well as the welfare of Summerville. Memphis, Chicago, Boston, New York, Philadelphia and Baltimore are entitled to the advantage which accrues to them from the competition afforded by the various competing lines which extend from those cities to Charleston. And Charleston is as much entitled to the advantage of the fact that it can avail itself of the competition which exists between those various competing lines, as Summerville is entitled to avail itself of the advantage of the fact that it is somewhat nearer than Charleston to Memphis.

Phipps vs. L. & N. W. Ry. Co., Law Rep. (1892), 2 Q. B., 329, et seq.

The Phipps case was cited approvingly by this Court in 162 U. S., 224, T. & P. Ry. vs. I. C. C.; and 168 U. S., p. 164, I. C. C. vs. Alabama Midland Ry. Co., et al.

I also contend that the competition at Charleston "ought justly to have effect upon the rates," if we are to have due "regard to the interests" of the appellant carriers.

The rates from Memphis to Charleston yield the carriers a small margin of profit over the additional cost of the movement of that traffic; and it is to the fair interests of the appellants to be allowed to earn that margin of profit, however small it may be. It is by making small "margins of profits," on large volumes of low-rate traffic, shipped between competitive

points, that much of the revenue of railroad companies in this country is earned.

So long as there is any "margin of profit" at all, the appellants sustain no *loss* in the carriage of traffic to Charleston; and therefore they are under no temptation to increase the rates to the shorter distance points to recoup against loss. In other words, to paraphrase the language of this Court, "having due regard to the interests of the public, as well as of the appellant carriers, the competition at Charleston ought justly to have effect upon the rates;" and the Commission ought, in this case, to have allowed the appellant carriers to take that competition into consideration, notwithstanding it was competition between carriers *confessedly amenable to the Act to Regulate Commerce;* and between carriers serving different competing markets.

XLVIII.

The Mere Fact that the Disparity Between Through and Local Rates is Considerable Does Not of Itself Show that the Preference or Advantage is Undue or Unreasonable.

In the case of the Texas & Pacific Railway vs. Interstate Commerce Commission, 162 U. S., 219, 220, this Court say:

"The mere circumstance that there is, in a given case, a preference or an advantage, does not of itself show that such preference or advantage is *undue* or *unreasonable* within the meaning of the Act. Hence it follows that before the Commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts; and here again we think it evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the Commission in forming its judgment whether such preference or advantage is undue or unreasonable."

In the same case, on page 239, the Court say:

"The mere fact that the disparity between the through and the local rates was considerable did not, of itself, warrant the Court in finding that such disparity constituted an undue discrimination—much less did it justify the Court in finding that the entire difference between the two rates was undue or unreasonable, especially as there was no person, firm or corporation complaining that he or they had been aggrieved by such disparity."

In the case of the Savannah Bureau of Freight & Transportation vs. the Charleston & Savannah Ry. Co., 7 I. C. Rep., p. 480, the Commission having decided that certain shorter distance rates involved in that case were not a violation of the fourth section, says:

"Whether those rates are in violation of the third section, in that they give an undue preference to the more distant point, is a different question which might arise in cases of this kind. It is incidentally raised by the allegations in this complaint, but was not relied upon on the trial. There is nothing in the case which bears upon it except the mere fact that the rate to the intermediate point is higher. Under these circumstances we have not considered the question as fairly before us, and do not pass upon it in disposing of the case."

I have shown in Section XXIV of this argument, that in the case at bar, the Commission based the order in controversy upon the fourth section, and that all other questions that might have been raised and decided were treated by the Commission as immaterial; and in that respect the case at bar is analogous to the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., just referred to. And so in the case at bar, as in that case, there is nothing which bears upon the question of undue preference "*except the mere fact that the rate to the intermediate point is higher.*"

Under the authority of the case of the Texas & Pacific Railway vs. I. C. C., as well as under the authority of the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co., cited above, I contend that there is no sufficient evidence in the record in this case to justify this Court in declaring that the mere disparity in rates between

Summerville and Charleston constitutes an undue preference in favor of the latter, or an undue prejudice against the former.

In the case at bar, this Court is asked by counsel for the appellee to do precisely what the Commission refused to do in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., viz: to declare that the appellants have given undue preference to the longer distance point, when there is nothing in the case which bears upon that question, except the mere fact that the rates to the shorter distance point are higher. This Court is asked to do the very thing for which it reversed the Court of Appeals in the case of Texas & Pacific Railway vs. Interstate Commerce Commission, namely, to declare that the mere fact that the disparity between the through and the local rates is considerable, warrants the Court in finding that such disparity constitutes "an undue discrimination." It is certain that this Court has no more evidence before it in this case, than the Commission had before it in the case of the Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., or the Court of Appeals had before it in the case of the Texas & Pacific Railway Co. vs. I. C. C., upon which to predicate a decree that the rates in controversy are violative of the third section.

XLIX.

The Contention of Appellees would lead to the Adoption of Mileage Rates, which are Impracticable in this Country.

Counsel for the appellee may contend that while some difference between the rates to Summerville and the rates to Charleston may be justifiable, the present differences are too great. He does not suggest what the differences ought to be, other than that the rates to Summerville ought not to be higher than the rates to Charleston.

Under the order made by the Commission in this case the appellants are enjoined from charging any greater compensa-

tion to Summerville than to Charleston; but they are not enjoined from charging as great compensation to the former as to the latter. Such an order is intelligible under the *fourth* section; but it is wholly unintelligible under the *third* section.

If it constitutes undue preference in favor of Charleston, to charge less to Charleston than to Summerville, it constitutes unjust prejudice against Summerville to charge as much to Summerville as to Charleston. If distance is to be the controlling factor in determining whether undue preference, or undue prejudice, exists in a given case, *all rates must be constructed upon a mileage basis;* and instead of permitting the appellants to charge as much to Summerville as to Charleston, the Commission should have ordered the appellants to charge less to Summerville; and to so reduce their rates to Summerville as to make them the same per ton per mile as those charged to Charleston. In a word, the Commission (if it has the power to prescribe future rates) should have ordered the appellants *to construct their tariffs on a mileage basis.*

The theory of equal mileage rates is entirely correct in all cases *where competition does not interfere with it.* But in cases where competition does interfere, the theory of equal mileage rates cannot be adopted in actual practice; and though it has been proposed in every country, it has been abandoned by all.

In the report of the case of Ransome vs. E. C. Ry., on page 71 of 1 Nev. & Mac., in Note 6, there is an abstract from the report of the English Parliamentary Committee upon the amalgamation of railways in 1872, in which they declare equal mileage rates to be impracticable.

"First, because *it would prevent railway companies from lowering their rates so as to compete with traffic by sea, by canal, or by a shorter or otherwise cheaper railway, and would thus deprive the public of the benefit of competition, and the company of a legitimate source of profit.*"

Second, "it would prevent railway companies from making perfectly fair arrangements for carrying at a lower rate than usual, goods brought in large and constant quantities, *or from*

carrying for long distances at a lower rate than for short distances."

The report continues: "In short, to impose equal mileage rates on the company *would be to deprive the public of the benefit of much of the competition* which now exists, or has existed; to raise the charges on the public in many cases where the companies now find it to their interest to lower them; and *to perpetuate monopolies*, in carriages, trade and manufacture, *in favor of those routes and places which are nearest* and least expensive, where the varying charges of the company now create competition. And it will be found that the supporters of equal mileage, when pressed, often really mean, *not that the rates they themselves pay are too high, but that the rates which others pay are too low.*"

In March, 1885, the Senate appointed a select committee on Interstate Commerce. The committee took a mass of testimony, filling a volume of 1,450 pages; and made a report which, with its appendix, fills over 200 pages, and in its report, it embodied the report of the English Parliamentary Committee, quoted above.

See Report of Senate Select Committee on Interstate Commerce, Jan., 1886, p. 57.

In the case of I. C. C. vs. Alabama Midland Ry. Co., Judge Bruce said: "In the case at bar there are questions of competing lines; and the proposition of the complainant is that, notwithstanding this, the circumstances and conditions are substantially the same, and that it is in violation of the fourth section of the statute to charge more for the short haul to Troy, the shorter distance, than to Montgomery, the longer distance point. This argument proceeds upon the view that distance is the controlling factor on a question of rate for transportation of property; and yet *these other matters may be, and often are, more controlling than even distance itself.*"

69 Fed. Rep., p. 231, I. C. C. vs. Alabama Midland Ry. Co.

In the case of Imperial Coal Co. vs. Pittsburg & L. E. R. Co., it was held by the Commission that "in determining the question of undue prejudice from a rate, distance is only one of

the factors, and other material facts, such as character and quality of the commodity, cost of production, *extent and nature of the competition in the business itself and by other transportation lines*, and the interests of the public in the use of the commodity and its market cost, are to be considered."

2 I. C. Rep., p. 436, Imperial Coal Co. vs. Pittsburg & L. E. R. Co., 3d head note.

In the case of Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Railway Co., decided December 31st, 1897, the Commission said: "Upon the other hand, *it often happens that distance is altogether disregarded*, and it has been held that this may be proper within certain limits and under certain conditions."

7 I. C. Rep., p. 474, Savannah Bureau of Freight & Transportation vs. Charleston & Savannah Ry. Co.

In the case at bar the Court is asked to hold that the mere fact that a greater rate is charged for a shorter than for a longer distance, constitutes an undue preference of the longer distance point over the shorter distance point. The charge of undue preference *is based upon distance alone*, and it must be sustained, if at all, upon the theory that distance must control in rate-making, to the disregard of all other circumstances and conditions.

L.

Neither The Common Law, Nor the Act to Regulate Commerce, Requires Equality of Charge, Except Where the Services are Similar.

The following language is used in the majority opinion of the Court of Appeals in this case:

"This statute was intended to prevent *any and all kinds* of discrimination in favor of localities, individuals, or corporations, and to put all shippers on the same footing—that of *perfect equality*."

Trans., p. 132.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says: "Now I think that no one can read these schedules fixing the rates of through traffic from the seaboard to Chattanooga (the shorter distance point in that case), and to Nashville and Memphis (the longer distance points) through Chattanooga, without being instantly and strongly impressed that there is something wrong in the principle on which such rates are adjusted, and that the *equality* which the Commerce Act was enacted to secure has been utterly disregarded."

85 Fed. Rep., p. 110.

Again he says: "If for such causes as existed here such *unequal* charges can be made along the same line of traffic, the inevitable result must be that the Commerce Act will prove of no value, and the leading principle of the common law relating to the same general subject will be overthrown."

85 Fed. Rep., p. 113.

Neither the common law nor "the Commerce Act" requires "equality" of charge, *except where the services are similar.*

In the case of I. C. C. vs. B. & O. R.R., 145 U. S., 275, Mr. Justice Brown, speaking for this Court, says: "Prior to the enactment of the Act of February 4, 1887, to regulate commerce, commonly known as the Interstate Commerce Act, 24 Stat., 379, c. 104, railway traffic in this country was regulated by the principles of the common law applicable to common carriers, which demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable. It was even doubted whether they were bound to make the same charge to all persons for the same service; (citing cases) though the weight of authority in this country was in favor of an *equality of charge* to all persons *for similar services.*"

It has been held by this Court in the "Import Case," as well as in the "Alabama Midland Ry. Case," that the service rendered by a carrier in the transportation of traffic to a competitive point is not "similar" to the service rendered in the transportation of traffic to a non-competitive point; and therefore a person shipping to a non-competitive point is not

entitled to an "equality" of charge with one shipping to a competitive point.

In ex parte Koehler, 31 Fed. Rep., p. 321, Judge Deady said: "The places between which competition in transportation exists between water crafts and railways, *or even the latter*, always will and must send and receive freight at lower rates than others not so favored. This is the result of natural advantage, supplemented often by exceptional sagacity and enterprise, and it would be folly in the Legislature to prevent it if it could. As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give each one an even chance and a fair show to make the most of his or its opportunities, and leave the result to circumstances over which it has little, if any, direct control."

In the case of Brewer & Hanleiter vs. Central of Georgia Railway Co., 84 Fed. Rep., p. 268, Judge Speer said: "Shall government undertake the impossible but injurious task of making the commercial advantages of one place equal to those of another? It might as well attempt to equalize the intellectual powers of its people. There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce. The Act to Regulate Interstate Commerce has no such purpose, and yet this appears to be the inevitable result of the decree the complainants seek in the case, without any adequate corresponding advantage either to themselves or to the community in which they live."

If the law be that all persons are entitled to an "equality" of charge, there would be no use for the first section of the Act which requires that rates be reasonable; nor for the second section of the Act which prohibits unjust discrimination; nor for the third section of the Act which prohibits undue preference; nor for the fourth section of the Act which prohibits a greater charge for a shorter distance than for a longer distance, etc. If the law be that all rates shall be equal; or that all rates shall be equal in proportion to mileage; the first four sections of the Act are wholly unnecessary.

LI.

The Preference which Exists in Favor of Charleston is due to her Natural Advantages, and not to the Fault or Contrivance of the Appellants.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says:

"If the fact of such competition is allowed to become a *dominating* factor in fixing the relative charges of transportation to the different places along the lines, those communities where there is no competition must be blighted by the disadvantage with which they are burdened, and the favored places grow prosperous in the sacrifice of others." . . . "With this as the rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever. At least this would seem to be the very probable tendency."

85 Fed. Rep., p. 113.

If the fact of competition is *not* to be allowed to operate as a *dominating* factor in fixing the relative charges for transportation, then it must be prohibited or stifled altogether. Because, if competition be allowed to operate at all, it *necessarily* becomes a *dominating* factor in fixing the relative charges for transportation to the different places along the line of a railroad.

As said by Judge Deady:

"The places between which competition in transportation exists between water craft and railways, *or even the latter*, always will, and must, send and receive freight at lower rates than others not so favored."

31 Fed. Rep., p. 321, Ex Parte Koehler.

We are therefore confronted with the question as to whether it was the intention of Congress, in passing the Act to Regulate Commerce, to prohibit or stifle competition.

The fifth section of the Act which prohibits pooling, is alone sufficient to show that Congress had no such intention. It expressly prohibits every contract, agreement or combination for pooling; and pooling was prohibited because it was supposed to have a tendency to stifle competition.

In the case of I. C. C. vs. B. & O. R. R. Co., Mr. Justice Brown, speaking for this Court, said that:

"It was not the design of the Act to stifle competition."
145 U. S., p. 281, I. C. C. vs. B. & O. R. R. Co.

If it was not the design of the Act to stifle competition, and if the necessary effect of competition is to enable those places between which competition exists to send and receive freight at lower rates than others not so favored, are the competing lines to be censured for the disadvantage under which those places labor at which no competition exists?

Judge Severens speaks of the shorter distance points as being "*blighted* by the disadvantage with which they are burdened." Now, if it be conceded for the sake of argument that he is correct in describing them as "blighted," are the competing lines censurable for the "blighted" condition of those places?

The question is well answered by Judge Deady, as follows:

"It is not the fault or contrivance of the railway that compels this discrimination, but it is the necessary result of circumstances altogether beyond its control. It is not done wantonly, for the purpose of putting the one place up, or the other down, but only to maintain its business against rival and competing lines of transportation. In other words, the matter, so far as the railway is concerned, resolves itself into a choice of evils. It must either compete with the boats during the season of water transportation, and carry freight below what the Legislature declared to be a reasonable rate, or abandon the field and let its road go to rust."
23 Fed. Rep., 533, Ex Parte Koehler.

In another case Judge Deady said:

"Freight carried to or from a competitive point, is always carried under substantially *dis*similar circumstances and con-

ditions from that carried to or from non-competitive points. In the latter case, the railway makes its own rates, and there is no good reason why it should be allowed to charge less for a long haul than for a short one. When each haul is made from, or to, a non-competitive point, the effect of such discrimination is to build up one place at the expense of the other. Such action is willfully unjust, and has no justification or excuse in the exigencies or conditions of the business of the corporation. In the former case, the circumstances are altogether different. The power of the corporation to make a rate is limited by the necessities of the situation. Competition controls the charge. It must take what it can get, or abandon the field, and let its road go to rust."

31 Fed. Rep., 319, Ex parte Koehler.

LII.

Charleston is not Unduly Favored by the Appellants.

Judge Severens speaks of the longer distance points as "favored places," and says that they "grow prosperous in the sacrifice of others."

In what sense is Charleston "favored"? Is it "favored" in any other sense than that the rival lines centering at that point compete with each other as the Interstate Commerce Act allows them to do? If those lines should enter into any contract, agreement, or combination to pool their freights at that point, and in that way (as is supposed) stifle competition, they would commit an offense against the fifth section of that Act. If they should enter into any "trust" arrangement to control the rates at that point, they would render themselves amenable to the Anti-Trust Law.

166 U. S., p. 290, U. S. vs. Frt. Assn.

The Appellants are therefore placed in this dilemma. If they enter into any contract, agreement or combination to stifle competition at Charleston, they violate one and perhaps two acts of Congress. If they compete with each other, in good faith, at that point, inasmuch as the necessary result of such

competition (as said by Judge Deady) is to reduce the rates at that point, then, according to Judge Severens, they are guilty of "favoring" that point; which is but another way of saying that they give to that point an *undue* and *unjust* preference. It would seem, therefore, "that they are to be damned if they do, and to be damned if they don't."

If it be said that Charleston is "favored" over the local stations on the S. C. & Ga. R.R. in the sense that Charleston is geographically so located as to be situated on the ocean, on two navigable rivers, and to have become the point of intersection of three lines of railway, the fact is admitted; but it furnishes no just ground of complaint either against Charleston, or against the railway lines which center there.

As said by Judge Deady, "It is not the fault of the railways that the shipper, who does business at a competing point, has the advantage of it."

23 Fed. Rep., 533, Ex Parte Koehler.

Neither is it the fault of Charleston or of the merchants who are located there that they have the benefit of the competition which exists there. As said by the English Court of Appeals: "I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed that he has two competing routes, is not as much a circumstance to be taken into consideration as the geographical position of the other trader, who, though he has not the advantage of competition, is situated at a point on the line geographically nearer the market."

"Why the logical situation, in regard to its proximity to the market, is to be the only consideration to be taken into account, in dealing with the question, as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, *the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of advantage which he derives from that favorable position of his works.*"

Law Rep. (1892), 2 Q. B., p. 242, Executors of Phipps vs. L. & N. W. Ry. Co.

When Judge Severens speaks of the shorter distance points being "blighted by the disadvantage with which they are burdened," it becomes important to ascertain by what disadvantage they are burdened; and by whom that burden is imposed. Is Summerville burdened by any disadvantage except that no competing lines of transportation center there? And is that a disadvantage occasioned by the action of the appellants; or is it a disadvantage which arises solely from the geographical location of that place?

LIII.

Charleston has not "Grown Prosperous in the Sacrifice" of Summerville or Other Shorter Distance Points.

When Judge Severens speaks of the longer distance points growing "prosperous in the sacrifice of others," in what sense does he use the word "sacrifice"? Can any one show, or will any one undertake to assert, that prior to the promulgation of the rates which competition has forced the appellants to accept upon Charleston traffic, Summerville enjoyed lower rates than it now enjoys? On the contrary, is it not a notorious fact that the rates to such local stations as Summerville were very much higher than they are now; and is it not manifest that at Summerville, and other local stations, where the rates base upon Charleston, every reduction which competition has heretofore forced in the Charleston rates has inured, to the full extent of such reduction, to the benefit of those local stations? And if that be true, how can it be said that Charleston has grown prosperous "in the sacrifice of those stations"? On the contrary, those stations have been benefited by the reduction in Charleston rates; and Charleston, instead of becoming prosperous "*in the sacrifice*" *of those stations*, has shared her prosperity with them.

LIV.

Summerville, and Other Shorter Distance Points Have Not "Become Poorer;" But on the Contrary Have Steadily Advanced in Wealth and Population.

Judge Severens, speaking of the rule of charging more for a shorter than a longer distance, where competition compels the lower charge to the longer distance point, says:

"With this as the rule in adjusting rates, it seems certain that the poor places must become poorer and the localities more sparsely settled than ever."

It is true that the density of population and of traffic is much greater in the States north of the Ohio, and east of the Mississippi Rivers, than it is in the States south of the Ohio; but the fact may be accounted for in many ways other than by ascribing it to the difference which it is claimed exists in the method of rate-making in the two territories. The prejudice against slavery which was entertained by all Europe prevented European immigration to the South, and induced it to the North. Among the immigrants, were numerous skilled mechanics and miners, who developed the mining and manufacturing industries of the North; while the South remained, until after the war, an exclusively agricultural country. Since the war, the industries of the South have become more diversified; and the local non-competitive stations of the South have prospered since the war in a ratio corresponding with the prosperity of similar non-competitive stations in the North.

It is to the pecuniary interest of every railroad to develop the traffic of its local stations; and, by that process of development, such stations gradually increase in population, manufactures, etc., until they become so large as to invite the construction of other railroads; and in time they develop into competing points. The process, however, is gradual, and

necessarily slow; but it is a *natural* process of evolution. The Commission, however, is not content to await the operation of natural causes; and it proposes, by an artificial process, to place non-competitive stations upon an arbitrary equality with competitive stations. It is contended that such arbitrary process of leveling the railroad rates of the country is not only authorized, but required, by the Act to Regulate Commerce. On the contrary, Judge Deady said:

"Congress never intended to make of this act a Procrustean bed, in which the conduct of the business of all the roads engaged in interstate commerce shall be made to conform to one arbitrary rule, without reference to the probable and even unavoidable difference in the conditions and circumstances under which it must be transacted."

31 Fed. Rep., pp. 320, 321, Ex Parte Koehler.

LV.

The Appellants Have not Attempted to Build up Charleston at the Expense of Summerville.

The majority opinion of the Court of Appeals contains this language:

"The appellees contend that the smaller charge for the greater distance is, in this case, of great importance to the city of Charleston, as well as to the section of country adjacent thereto, as by means thereof the merchants of that city are enabled *to build up trade that would otherwise be lost to them.* That may be true, but is not the same argument applicable to Summerville and other interior cities along the lines of the roads operated by the appellees between Charleston and Memphis? *In order to build up one locality*, we should not tear down many others; and justice to one section should not be purchased at the expense of another."

Trans., p. 133.

The majority of the Court of Appeals misapprehends the position taken by the appellants in this case. Railroad com-

panies do not claim the right "to build up trade;" or "to build up one locality," "at the expense of another." They do claim the right to recognize the natural advantages which one place has over another, and to meet such rates as competition may force them to accept at a place which possesses superior natural advantages; provided such competitive rates yield something more than the additional cost of transportation. If their acceptance of such competitive rates at places possessing superior natural advantages has a tendency "to build up trade" at such places more rapidly than it can be built up at places which do not possess equal natural advantages, the result is due to natural and commercial causes, and not to the fraud or contrivance of railroad companies.

The South Carolina & Georgia Railroad from Charleston to Augusta passes through a comparatively poor and sparsely settled section of the country, and it would be manifestly to the pecuniary interest of that company, if the trade and population of Summerville and each and every other local station on its line were as great, or even greater, than the trade and population of Charleston.

At Charleston, that company is compelled to share the traffic done at that place with the other all-rail lines and with the other water lines of transportation, which do business at that port; whereas at Summerville and other local stations on the line of the South Carolina & Georgia Railroad, that company would secure the carriage of all the traffic offered for transportation. That company is even more interested in building up the trade of Summerville and its other local stations, than are the merchants and business men who reside there; but it is physically impossible for that company to give to those local stations the same advantages that they would possess if each of them was located where Charleston now is.

The Act to Regulate Commerce declares it to be unlawful *for any common carrier* subject to the act, "to make or give any undue or unreasonable preference or advantage to any particular . . . locality or any particular description of traffic," etc.

The Act does not hold a common carrier responsible for a preference or advantage, however great it may be, unless it be occasioned *by some wrongful act of the carrier.*

As between Charleston and Summerville, it must be remem-

bered that Charleston possessed great natural advantages over Summerville, before any of the railroads involved in this controversy were dreamed of.

Charleston was founded in 1680 by an English colony, and during the first century of its existence, it attained great commercial importance.

Before the South Carolina Railway was built, freight from Memphis was carried down the Mississippi River to New Orleans, and thence by ocean to Charleston. From Charleston, it was doubtless hauled in wagons to Summerville, 22 miles, at a wagon rate that was much higher than the railroad rate of 9 cents per 100 pounds.

We see, that in those early days, the "preference or advantage" in favor of Charleston, or the "discrimination" against Summerville, was much greater than it is now. But as the "preference or advantage" in favor of Charleston, or the "discrimination" against Summerville, in those days, was manifestly, the act of God, no one ever assumed to characterize it as "undue," or "unjust." The "preference" or "advantage" which Charleston then enjoyed over Summerville, instead of being denounced as "undue or unreasonable," was recognized as justly due to Charleston, on account of her natural advantage of location; and every one regarded it as perfectly "reasonable" that she should enjoy the blessings which God had given her.

When the South Carolina & Georgia R. R. was constructed from Charleston to Summerville, that company *recognized* the "preference or advantage" which the Almighty had shown to Charleston; but so far from doing anything to increase the "prejudice or disadvantage," under which Summerville then labored, the company reduced the rate from Charleston to Summerville, by exactly the difference between wagon rates, and rail rates.

The completion of the rail route from Memphis to Charleston had the effect to change the *relative* geographical relation which had previously existed between Summerville and Charleston with respect to Memphis; so that Summerville

became geographically nearer than Charleston, to Memphis. And, had there been nothing else in the case, Summerville would have received lower rates than Charleston, from Memphis.

But Charleston can purchase hay in Boston, with a steamship rate of 20 cents per 100 lbs.; or in New York, and Philadelphia, with a steamship rate of 14 cents per 100 lbs., or a schooner rate, from New York, of 8 cents per 100 lbs.; or in Baltimore, with a rail-and-water rate of 17 cents per 100 lbs.; or in Chicago, with a lake, rail and schooner rate of 16 cents per 100 lbs. (See Sections XIV, XV of this argument.) It is impossible, therefore, to prevent Charleston from getting hay at less rates than Summerville; even if the rate from Memphis to Summerville were reduced to 19 cents per 100 lbs., as ordered by the Commission.

The *geographical* relation now existing between Summerville and Charleston with respect to Memphis, is of no consequence, so long as Charleston can use Chicago, Boston, New York, Philadelphia, and Baltimore, *as a base of supplies.* The question is one of *strategical* rather than of *geographical* relations; and Charleston has a better *strategical* position than Summerville can possibly attain.

If the appellant railroad companies should raise the rate from Memphis to Charleston, so as to make it the same as the rate from Memphis to Summerville (i. e., 28 cents per 100 lbs.), the results would be:

First: Memphis would be driven out of the Charleston market.

Second: Appellants' lines of railroad would be deprived of all the traffic which they have heretofore carried from Memphis to Charleston.

Third: Charleston would be deprived of the benefit which she has heretofore enjoyed of having Memphis compete with Chicago, Boston, New York, Philadelphia, and Baltimore in the Charleston market.

Fourth: But Charleston would continue to have lower rates, than Summerville, from Chicago, Boston, New York, Philadelphia and Baltimore.

Fifth: In no event could the relative rate position of Summerville, as compared with Charleston, be in any way improved.

In the case of the Interstate Commerce Commission vs. B. & O. R. R. Co., 145 U. S., p. 281, Mr. Justice Brown, in discussing what would be the effect of requiring the B. & O. R. R. Co. to withdraw the "party-rate" tickets from sale, said:

"If these tickets were withdrawn, the defendant road would lose a large amount of travel, and the single-trip passenger would gain absolutely nothing."

And so, in this case, if the appellant railroads were ordered to raise the joint through rate from Memphis to Charleston, to the combination rate now charged from Memphis to Summerville, while they would lose a large amount of traffic, Summerville "would gain absolutely nothing."

In considering the question of undue preference as between Charleston and Summerville, it must be borne in mind that while Summerville has the advantage of being nearer than Charleston to Memphis, Charleston has the advantage of having at least three actively competing routes from Memphis; while Summerville has but one route from Memphis. In the case of the Executors of Phipps vs. L. & N. W. Ry. Co., Law Rep. (1892), 2 Q. B., p. 242, referred to above, the English Court of Appeals used this language:

"It is said that it is unfair to the trader who is nearer the market, that he should not enjoy the full benefit of the advantage to be derived from his geographical situation, at a point on the railway nearer the market, than his fellow-trader, who trades at a point more distant; but I cannot see, looking at the matter as between the two traders, why the advantageous position of the one trader in having his works so placed *that he has two competing routes*, is not as much a circumstance to be taken into consideration, as the geographical position of the other trader, who, though he has not *the advantage of compe-*

tition, is situated at a point on the line geographically nearer the market."

"Why the local situation, in regard to its proximity to the market, is to be the only consideration to be taken into account, in dealing with the question, as a matter of what is reasonable and right as between the two traders, I cannot understand. Of course, if you are to exclude this from consideration altogether, *the result must inevitably be to deprive the trader who has the two competing routes of a certain amount of advantage which he derives from that favorable position of his works.*" p. 242.

The Phipps case was cited approvingly by this Court, in Texas & Pacific Ry. Co. vs. I. C. C., known as the "Import" case, 162 U. S. 224; and in I. C. C. vs. Ala. Midland Ry. Co., 168 U. S. 164.

LVI.

The Reduction of Rates to Summerville and Other Shorter Distance Points Would Not Increase Either the Tonnage or the Revenue of Appellants' Lines.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et. al., Judge Severens says:

"And although I must express an opinion upon a mere question of policy for the carriers with much diffidence, I am very strongly inclined to the belief that their (the carriers') interests would in the long run be better promoted by adhering more closely to the rules of the statute than was done in the present case, or is likely to be done under the practice which their counsel endeavors to justify."

85 Fed. Rep., p. 113.

The practice to which Judge Severens refers is that of charging more for a shorter than for a longer haul, where competition compels the acceptance of lower rates at the longer distance point. His Honor's idea is that if the shorter distance points were not charged more than the longer distance points,

the traffic of the shorter distance points would be increased, and, in that way, the carrier's revenue would be increased.

His Honor's opinion upon any question of *law* is entitled to the highest respect; for he is one of the most eminent jurists of the country. His opinion, however, as to the probable effect of any particular mode of rate-making is, of course, the opinion of one who has not had a very extended experience in traffic matters. But whatever weight may be given to his opinion upon the subject, his suggestion involves an experiment, the entire expense of which would have to be borne by the carriers.

A similar suggestion was pressed upon Mr. Justice Brewer in the case of Chicago & N. W. Ry. Co. vs. Dey, and in reply thereto he said:

"Again it is said that it cannot be determined in advance what the effect of the reductions will be. Oftentimes it increases business, and who can say that it will not in the present case so increase the volume of business as to make it remunerative, even more so than at present? *But speculations as to the future are not guides for judicial action.* Courts determine rights upon existing facts. Of course there is always a possibility of the future; good crops may increase transportation business, poor crops reduce; high or low rates may likewise affect; but the only fair judicial test is to apply the rates to the business that has been done in the past, and see whether upon that basis such rates will be remunerative, or compel the transaction of business at a loss."

35 Fed. Rep., p. 881, Chicago & N.W. Ry. Co. vs. Dey.

If the Government of the United States desires to conduct experiments in railroad rate-making, as it has a perfect right to do, it should either defray the expense of such experiments, or guarantee the companies against loss resulting therefrom. If the Government should see proper to exercise its right of eminent domain by appropriating the interstate railroad property of this country to its own use, I believe that the owners of such property would be more than willing to surrender the railroads to the Government, at anything like a fair valuation. But so long as the Government insists upon the railroads being operated by their owners, the owners ought not to be forced to

undertake costly experiments in rate-making which, in the opinion of experienced traffic managers, would result in disastrous failure.

It is fair to assume that the traffic managers of the Southern railroads, who are men of long and varied experience, and some of them of world-wide reputation, are competent judges as to what line of conduct would most tend to increase the revenues of their companies; and the financial condition of Southern railways is such as to justify us in assuming that their traffic managers have every motive to increase their revenues.

Counsel for appellee may quote from an opinion of Hon. Aldace F. Walker, formerly a member of the Commission, in which Mr. Walker expressed the same view as Judge Severens. But it is proper to say that neither Mr. Walker nor Judge Severens has ever had any experience in the operation of railroads in Southern territory. A line of conduct which might be eminently wise in Trunk Line territory, where population and traffic are very dense, might be eminently unwise in Southern territory, where the population is sparse; and the volume of traffic, which is light, is scattered at long intervals, through large sections of country, some of which are incapable of supporting even the few people who inhabit them.

Sometimes a reduction in rates will increase the consumption of certain articles, and in that way increase the traffic, and consequently, the revenue of the railways carrying the traffic. But it is by no means true in all cases. In fact, it is true in no case, except where the rate charged for transportation represents so large a proportion of the market value of the article transported, *that it is practicable for the merchant who sells the article to give the consumer the benefit of the reduction.* To illustrate my meaning:

By reference to the order made by the Commission in this case, it will be noticed that the Commission ordered the appellants to cease from charging any greater compensation in the aggregate for the transportation of "hay or *other commodities*" from Memphis to Summerville than they charge from Memphis to Charleston. If the appellants should elect to comply with the order of the Commission by reducing the

rates to Summerville to the same as the rates to Charleston, it would result in a reduction of 9 cents per hundred pounds on hay. What the reductions would amount to upon other commodities is not shown in the record. Assuming the United States Army ration of 14 pounds of hay per day for a horse to represent the average amount of hay consumed per day by horses, mules etc., a reduction of 9 cents per hundred pounds would amount to less than $1\frac{1}{2}$ cents per day in the feed of a horse.

On a hat weighing six ounces, a difference of even 20 cents per one hundred pounds would amount to only $\frac{75}{1000}$ of a cent. A difference of even 20 cents per hundred pounds on coffee amounts to only 2 mills per pound; and to a consumer purchasing ten pounds of coffee for domestic use, the difference would amount to only 2 cents.

It is manifest that while such a reduction in rates might enable a merchant at Summerville to realize a greater profit on his sales to consumers, it would, in most instances, be of no importance whatever, so far as the consumer is concerned. No one would purchase any more hay, or wear any more hats, or drink any more coffee, because of any such reductions in rates; for, even if the merchant at Summerville were disposed to give the consumer the benefit of the reduction, *the amount is too small to make the change.*

Counsel may refer to what the reduction would amount to on car-load quantities. But *consumers seldom if ever purchase in car-load quantities.* As before stated, unless the reduction in rates be such as that it is practicable for the merchant to give the consumer the benefit of the reduction, (which is seldom, if ever, the case as to car-load quantities) consumption will not be increased; and therefore neither the volume of traffic carried by the railroad, nor the revenue derived from the traffic by the railroad, will be increased.

Counsel may insist, however, that even though the reduction may inure to the benefit of the merchant alone, the merchant is a part of the public, and as such, is entitled to have the reduction ordered in his interest. It must be remembered,

however, that the owners of railroad property are also a part of the public, and that their interests are entitled to some consideration. It seems to be a popular idea that whenever a merchant desires to increase his line of profit, all he has to do is to apply to a railroad commission, either State, or Federal, to have *his* profits increased, by diminishing the profits or dividends of railroad stockholders. Upon this point, in the recent case of Ricketts, Smith & Co. vs. Midland Ry. Co., Law Rep. (1896), 1 Q. B., p. 266, the English Railway Commission, speaking through Collins, J., said:

"I think, therefore, that the reasonableness of the rate *is not to be tried by its effect upon the trade of the persons who have to pay it.* It may be a prudent thing for a carrier to tempt traffic by charging rates much lower than he would reasonably be justified in demanding, having regard to the elements which I have referred to as primarily affecting the reasonableness of the rate; but this is a question of railway management, which, in my judgment, lies outside our province. *Within these limits he is entitled to get as much as he can, even though he thereby diverts a large part of the merchant's profit into his own pocket.*"

If the rates to Summerville should be reduced, so as to be not higher than the rates to Charleston, it would doubtless, in some instances, induce merchants at Summerville to purchase their goods in Memphis, instead of purchasing them in Charleston; though even under the present rates, the appellee seems to have made his purchase in Memphis. But the volume of their purchases would be no greater than they have heretofore been. The number of their customers would not be increased; the amount consumed by their customers would not be increased; and, therefore, traffic, and the revenue of the railroads, would not be increased. While there might be a *diversion* of a certain portion of traffic from Charleston to Summerville, there would be no substantial *increase* in the aggregate volume of traffic, carried to that vicinity by the appellants.

Unless reductions in rates are such as *to reach consumers and induce them to use more of the articles* upon which the reductions are made, there can be no *increase* of tonnage produced by such reductions.

LVII.

It is Not a Proper Function of Government to Attempt to Equalize Either the Business Facilities or Social Relations of Communities.

Judge Severens further says:

"And public policy would also be advanced by the opposite course, not only in the encouragement which would thus be given to the distribution of commerce and population, but also in extending that *equality* of privilege which it is one of the prime objects of legislation to promote."

85 Fed. Rep., p. 113.

I have shown in Section L of this argument that neither the common law nor the Act to Regulate Commerce requires "*equality* of privilege" *except where the services are similar;* and I shall have nothing further to say upon that point. But as to Judge Severens' suggestion that public policy would be advanced by building up local stations at the expense of competitive stations, I submit that it is no proper function of government to deprive the competitive stations of the natural advantages which they enjoy. When Judge Severens says that public policy would be advanced in the "encouragement which would thus be given to the distribution of commerce and population," he can mean nothing else than that the commerce and population of Charleston, and other large basing points and trade centers in the country, ought, at least to a certain extent, to be taken away from them and distributed among the small local stations on the railroads which center there. In reply, I repeat the language of Judge Deady that:

"As long as people and places differ so widely in capabilities and facilities, social or business equality is impossible. Society can do no more than to give to each one an even chance and a fair show to make the most of his or its opportunities, and leave the result to circumstances over which it has little, if any, direct control."

31 Fed. Rep., 321, Ex Parte Koehler.

I also repeat the language of Judge Speer:

"There should be no attempt to deprive a community of its natural advantages, or of those legitimate rewards which flow from large investments in business industries, and competing systems of transportation to facilitate and increase commerce."

Brewer & Hanleiter vs. Central of Ga. Ry., 84 Fed. Rep., p. 268.

LVIII.

"Basing Points" or "Trade Centers" in the South.

The Commission is in the habit of inveighing against what are called "basing points" or "trade centers" in the South. They were described by Commissioner Walker, in one of the early cases before the Commission, as follows:

"Certain large cities and towns situated on the coast, at interior river points, and at railroad junctions, are *called* competitive, and receive quite low rates on all interstate traffic; all other stations are *called* local, and are charged much higher rates. The rates to local points are made by adding to the competitive rates at the nearest competitive point the local rate from that point."

1 I. C. Rep., p. 631, Harwell vs. C. & W. R.R.

It will be noticed that Mr. Walker says that basing points are "*called*" competitive, as if they were so designated as a matter of preference or favor; and that he speaks of them as "*receiving*" quite low rates, as though such rates were given to them by the carriers as a matter of favoritism or partiality.

Judge Cooley said in another of the early cases that the pre-eminence of such trade centers, in the Southern territory "is peculiar, and has probably been increased by the *concessions* in rates which the railroads have made to them, while making less *concessions* or none at all to less important stations." . . . "The prevalence of such ideas, and the acting upon them in

making freight tariffs, gives to railroad managers a power of determining within certain limits, what towns shall be trade centers, and what their relative advantages."

1 I. C. Rep., p. 278, In Re Southern Ry. & Steamship Assn.

There may have been a few mere "railroad junctions" which, owing to the ignorance or corruption of certain railroad officials, have been arbitrarily "called" competitive points, and which "received" certain arbitrary "concessions" in rates. There may also have been a few strictly local stations, which were not even "railroad junctions," where arbitrary and unfair "concessions" in rates have been made, by certain corrupt railroad officials, to enhance the value of property owned at such stations by said officials, or by their relatives or friends.

All such arbitrarily created so-called "trade centers," or "basing points," if any such have existed, were the offspring of ignorance or corruption, and justly deserve all that the Commission has said in denunciation of them.

The error of the Commission consists in failing to distinguish between those "trade centers" or "basing points," which may have been "arbitrarily created" by certain railroad officials, at certain local stations, or at certain railroad junctions, and those *natural* "trade centers" or "basing points," which are situated on the sea-coast, or other navigable water course."

Norfolk, Richmond, Wilmington, Charleston, Savannah, Brunswick, Augusta, Macon, Mobile, Montgomery, Columbus, Eufaula, etc., are illustrations of natural "trade centers," or "basing points" which are situated on the sea-coast, or other navigable water course.

Competition between numerous water craft enabled them to command exceptionally low rates of transportation, long before a mile of railroad existed on the face of the earth. It is manifestly erroneous to say that they have been "arbitrarily favored" with exceptionally low rates, by the ignorance or corruption of railroad officials. *Their rates were always very much lower than those of adjacent interior towns.*

When railroads were first constructed to those natural "trade centers," or "basing points," they found them in the enjoyment of exceptionally low rates, as compared with adjacent interior towns; and they simply recognized the rate situation as they found it.

It was impossible for the railroad officials to have increased the rates to those natural "trade centers," or "basing points;" because the same water craft that had reduced the rates in the first instance would have reduced them again, if the railroad officials had attempted to increase them.

Before any railroads were built in the South, traffic from New York and other North Atlantic ports, as well as traffic from Memphis and other Western points, was shipped to Summerville, by water to Charleston; and thence by wagon to destination.

Certain competitive through rates were charged by ships and boats from New York and other North Atlantic ports, or from Memphis and other Western points, to Charleston; and certain local wagon rates were charged from Charleston to Summerville.

Charleston, Savannah, &c., were important natural "trade centers" in those early days; and their prominence over interior towns, such as Summerville, &c., was far greater then than now. Summerville was then, as now, a local, non-competitive point.

The rates from New York and other North Atlantic ports, and from Memphis and other Western points to Summerville, were then, as now, "based" on through competitive rates from New York and other North Atlantic ports, or from Memphis and other Western points to Charleston; to which were added wagon rates from Charleston to Summerville.

We see, therefore, that Charleston is a natural "basing point," for making rates to Summerville; because it is the nearest natural "trade center" to that point.

We see, also, that Charleston, Savannah, &c., are natural

"basing points," or "trade centers," because they are situated on navigable water courses, and in the midst of large and fertile territories which are dependent upon them for commercial facilities; and not because of railroad favoritism.

It may be contended by counsel for the appellee that interior towns, such as Summerville, are entitled to participate in the benefit which has resulted from the construction of railroads; and that they ought not to be remitted to the condition which existed in the days of ox-carts and wagons. I agree that the interior towns are as much entitled as those which are situated upon water courses, to participate in the benefit which has resulted from the construction of the railway system; but I contend that they have been benefited by that system; and benefited even more, in proportion, than the cities situated upon water courses. Instead of paying the high rates formerly charged by wagons, they now have a very much better and more expeditious service by railway. The rates charged by railways are not only much less than those formerly charged by wagons, but the local rates in South Carolina are regulated by the Railroad Commission of that State.

The interior towns, such as Summerville, are not content, however, with having the benefit of all the competition that exists at the "basing points," or "trade centers," with the addition of only such local railroad rates as the South Carolina Railroad Commission may fix as reasonable; but they insist upon having *precisely* the same rates as if they were located *exactly* where the "basing points," or "trade centers," are located.

I submit that Congress never intended to interfere with the commercial advantages possessed by Charleston, or any other city; whether those advantages were due to natural causes, such as location upon a water course; or to artificial causes, such as the aggregation of capital, the exhibition of business enterprise and sagacity, &c.

Congress does not require equality of rates in any case except where there is a similarity of circumstances and conditions. If the circumstances and conditions be substantially dissimilar, it is not the intention of Congress to attempt to equalize them.

LIX.

"Basing Points" or "Trade Centers" in the North and West.

"Basing points" or "trade centers" are not confined to the South. Freight tariffs covering the traffic from the Eastern seaboard territory to Western points were, for many years, established under the rules and regulations of the associations then known as the Trunk Line, and Central Traffic associations. Under agreements of several years' standing, it had been the custom of roads, forming by connections through lines from the seaboard to the West, to determine through rates from New York to Chicago, "and to adopt such rates *as the standard or basis* for the construction of tariffs from other Eastern cities, and points adjacent thereto, which are directly or indirectly in competition for Western business."

"For twenty years or more the rates from Boston to Western competitive points have been the same as from New York. From Philadelphia and Baltimore, the rates are "agreed differentials"—less than New York—the Baltimore rates being also lower than Philadelphia rates."

The agreed rates and distances from New York to Chicago are taken as the standard, or 100 per cent. Through rates to the principal Western cities, towns and junction points in the territory above described, are computed at a percentage of the New York-Chicago rates, based generally on the relative mileage of such points to the Chicago mileage. For example, rates from New York to Indianapolis, Ind., are 93 per cent. of the New York-Chicago rates; Cincinnati, O., 87 per cent.; Columbus, O., 77 per cent.; St. Louis, Mo., 116 per cent., etc., etc. Thus the New York-Chicago rates being at all times applied as the basis, would, when changed, create relative changes in the rates to other Western points. In a similar manner the relation as to rates is maintained from the other Eastern cities. When the rates from New York to Western points are changed, like changes are made from Boston, Philadelphia, and Baltimore, and points receiving the same rates;

the "differentials" as between the Eastern cities being at all times maintained.

Wholesale Prices, Wages and Transportation, Senate Rep., No. 1394, 2d Sess. 52 Con., Part I., pp. 429, 430.

And so with reference to through rates from Kansas and Nebraska points to the seaboard. "The through rates to the Eastern seaboard are generally made on the combination of the rates east and west of the Mississippi River."

Wholesale Prices, Wages and Transportation, Senate Rep., No. 1394, 2d Sess. 52d Con., Part I., p. 552.

The rates and distances from New York to Chicago are taken as the base in the territory between those cities, because of the water competition from Chicago to New York via the Lakes, the Erie Canal and the Hudson River; and that line of water transportation is the only practicable water line between the northeastern seacoast and the Mississippi River. But the Southern territory is surrounded on the east and south by the Atlantic Ocean and the Gulf of Mexico; and on the west and north by the Mississippi and Ohio Rivers. It is also penetrated by numerous rivers navigable by steamboats from the ocean for considerable distances into the interior.

It is therefore impossible to adopt in the South any one set of rates, or any particular distance, as a standard for making rates for that entire territory. To illustrate: if it were attempted to take the distance, and the rates, from New York to New Orleans, as a standard or basis, and to fix the rates from New York to Norfolk, or from New York to Charleston, or from New York to Savannah, etc., as certain per cents of the rates from New York to New Orleans, such percentage rates could not be maintained like similar percentage rates are maintained between certain cities in the Trunk Line territory; because they would be cut, in almost every instance, either by the all-water lines, or by the rail-and-water lines.

That peculiar difficulties surround the rate situation in the South is conceded by the Commission, itself, in the following language:

"A study of the conditions under which railroad traffic in

certain sections of the country has sprung up is necessary to an understanding of the difficulties which surround the subject. The territory bounded by the Ohio and the Potomac on the north, and by the Mississippi on the west, presented to the Commission an opportunity, and also an occasion, for such a study. *The railroad business of that section has grown to be what it is in sharp competition with water carriers, who not only have had the ocean at their service, but by means of navigable streams were able to penetrate the interior in all directions.*"

First Annual Report Interstate Commerce Commission (1887), p. 16.

The only possible way by which the basing system employed in the Trunk Line territory could be made applicable in the Southern territory, would be to subject all carriers by water to the Act to Regulate Commerce, and to establish by legislative enactment or otherwise, certain relative maximum *and minimum* rates to and from all of the principal points in the South; and then require all carriers, whether by rail, or by water, to maintain the rates so fixed.

LX.

"Combination Rates" in the South.

The Commission is in the habit of inveighing against what are known as "combination rates."

Such rates are described by Commissioner Walker in one of the early cases as follows:

"The rates to local points are made by adding to the competitive rates at the nearest competitive point, the local rate from that point."

1 I. C. Rep., p. 635, Harwell vs. C. & W. R. R.

I have heretofore explained, in Section XVIII of this argument, how the "combination rates" are made from Memphis to Summerville.

It will be remembered that they are made by adding to the

competitive rates which prevail from Memphis to Charleston, the local rates of the S. C. & Ga. R. R., from Charleston to Summerville, as fixed by the South Carolina Railroad Commission.

It will be noticed that Summerville has the advantage of all the competition that exists at Charleston, and that it is only charged in addition thereto such local rates as the South Carolina Railroad Commission may fix as reasonable from Charleston to Summerville.

As an illustration of the principle upon which the combination rates in this case are made, the rate on hay from Memphis to Summerville is 28 cents per 100 pounds. It is made up of the low competitive rate from Memphis to Charleston of 19 cents, and a local rate, as fixed by the South Carolina Railroad Commission, from Charleston to Summerville of 9 cents, making a total of 28 cents.

There is no complaint that the rate of 19 cents per 100 pounds, from Memphis to Charleston, is unreasonably high. As it is the result of severe competition, the presumption is that it is lower than might, but for that competition, be reasonably charged.

There is no complaint that the rate of 9 cents from Charleston to Summerville is unreasonably high for a shipment originating at Charleston; and, as it is a rate fixed by the South Carolina Railroad Commission, the presumption is that it is very low.

It would seem that a "combination rate" formed of two rates, each of which is just and reasonable, would itself be reasonable.

88 Fed. Rep., p. 194, I. C. C. vs. W. & A. R.R. Co.

Similar rates were attacked in the Alabama Midland Case, and were sustained by the courts in that case.

74 Fed. Rep., p. 717, I. C. C. vs. Ala. Midland Ry. Co.

If the aggregate rate from Memphis to Summerville is to be reduced on hay from 28 cents to 19 cents per hundred pounds,

which amounts to a reduction of 9 cents, the question arises as to whether the reduction shall be made west of Summerville, or east of Summerville. If the reduction should be made west of Summerville it would fall upon all of the appellants; though none of them participate in the 9 cents rate complained of, except the S. C. & Ga. R.R. If it be said that the reduction should be made east of Summerville, then, the entire loss would fall on the S. C. & Ga. R.R.

The appellants whose roads are west of Augusta are under no legal obligation to make joint through rates with the S. C. & Ga. R.R.; and the S. C. & Ga. R.R. is under no legal obligation to make joint through rates with them. It has a perfect right to refuse to recognize any through bill of lading that may be issued by the roads west of Augusta for the transportation of freight from Memphis to Charleston.

37 Fed. Rep., 572, K. & I. Bridge Co. vs. L. & N. R.R. Co.

41 Fed. Rep., 563, L. R. & M. R. Co. vs. St. L. I. M. & S. Ry. Co.

51 Fed. Rep., 474, 475, O. S. L. & U. N. Ry. Co. vs. N. P. R. Co.

52 Fed. Rep., 915, C. & N. W. Ry. Co. vs. Osborne.

59 Fed. Rep., 402, 403, L. R. & M. R. Co. vs. St. L. I. M. & S. Ry. Co.

63 Fed. Rep., 778, 779, L. R. & M. R. Co. vs. St. L. & S. W. Ry. Co.

65 Fed. Rep., 41, St. Louis Drayage Co. vs. L. & N. R.R. Co.

86 Fed. Rep., 419, Gulf C. & S. F. Ry. Co. vs. Miami S. S. Co.

88 Fed. Rep., 662, Southern Indiana Exp. Co. vs. U. S. Exp. Co.

If the S. C. & Ga. R.R. should refuse to-morrow to recognize through bills of lading issued by the roads west of Augusta, and refuse to make joint through rates with those roads from Memphis to Charleston, it would deprive Charleston of one of her competing lines from Memphis; but it would not benefit Summerville in the least.

In the event supposed, hay shipped from Memphis, via

Augusta destined to Summerville would, either go from Augusta via the Port Royal & Augusta Railway and the Charleston & Savannah Railway to Charleston, and thence by the South Carolina & Georgia Railroad to Summerville, by which route the rate would be precisely the same as the present rate, as shown in Section XXII of this argument; or as shown in Section XVIII of this argument, it would be shipped from Memphis to Augusta at a rate of 22 cents per hundred pounds, and from Augusta to Summerville over the South Carolina & Georgia Railroad at a rate of 15 cents per hundred pounds, making a total rate from Memphis to Summerville of 37 cents per hundred pounds, which is 9 cents higher than the present rate.

The mere fact that the S. C. & Ga. R. R. and the roads west of Augusta have endeavored to accommodate the shipping public at the local stations on the line of the S. C. & Ga. R. R. by joining in through rates, and recognizing through bills of lading, which the public have no right to require as matter of law, furnishes no reason for adjudging the Summerville rates to be illegal; especially, as they are made on the lowest possible combination.

Any other view of the question will force the railroads of this country to abandon the system of through rates, and through bills of lading; in order to be allowed to charge their own reasonable rates, on their own roads.

LXI.

"Combination Rates" in the North and West.

Combination rates are by no means peculiar to the South.

In its eleventh annual report the Commission says:

"We have before us at the present time a complaint which alleges that the rate from Chicago, Ill., to Kearney, Neb., is discriminating and unlawful. The rate is made in this way: There is an interstate rate from Chicago to Omaha. The rate

from Omaha to Kearney is fixed by the Railroad Commission of the State of Nebraska. The through rate from Chicago to Kearney is made by adding to the through rate to Omaha, the local rate from Omaha to Kearney. Merchandise is transported by continuous shipment upon through bills of lading from Chicago to Kearney at this rate." . . . "We might order a reduction of the whole rate, *but we could not determine how that reduction should be shared by the different carriers.* If the carriers refuse to agree about that, *it is difficult to see how the order could be enforced. Clearly, to make and enforce such an order we must have power to determine the divisions of this through rate between the different roads making up the joint line.*

"KEARNEY IS BUT ONE OF THOUSANDS OF PLACES TO WHICH THE THROUGH RATE IS MADE UPON THIS SAME PLAN. A large part of interstate rates are joint rates, in reference to which the same thing would be true."

11 Ann. Rep., I. C. C. (1897), p. 27.

In this case, if the Court should order a reduction of 9 cents per hundred pounds on hay, from Memphis to Summerville, it could not determine how that reduction should be shared by the four carriers that participate in the transportation; and if those carriers should be unable to agree as to how the reduction should be shared between them it is, in the language of the Commission, "difficult to see how the order could be enforced." Clearly, to make and enforce such an order, the Court must have power to determine the divisions of the reduced through rate between the different roads making up the joint line. The roads west of Augusta could say truthfully that they have never received any part of the 9 cents per one hundred pounds which the Commission ordered to be deducted from the Summerville rate. They could say truthfully that they get exactly the same amount of revenue out of a shipment of hay from Memphis, whether it goes to Charleston or to Summerville; and therefore that they ought not to be required to sustain any part of the loss that would result from the enforcement of the order of the Commission. On the other hand, the South Carolina & Georgia Railroad Co. could truthfully say that if hay is brought to Charleston from Chicago, Boston, New York, Philadelphia, Baltimore, Norfolk, or any other ocean or Gulf port,

and is destined to Summerville, that company is entitled under the rates fixed by the South Carolina Railroad Commission to charge 9 cents per hundred pounds for transporting the hay from Charleston to Summerville, a distance of 22 miles; and that it ought not to be required to carry Memphis hay from Augusta to Summerville, a distance of 116 miles, for nothing; which it would be compelled to do, if it were forced to sustain the entire loss that will result from the reduction ordered by the Commission.

LXII.

The "Social Circle" Case did not Decide that Combination Rates are Illegal.

Counsel for the appellee may refer to what is known as the "Social Circle Case" as holding that "combination rates" are illegal.

In the "Social Circle" case it was held that where two or more roads join in making combination through rates on interstate traffic, such roads constitute but one "line;" and such "line" is subject to the Act to Regulate Commerce; though one of the roads may be wholly within a single State. But it was not even intimated in that case, that a "combination-rate" charged by such a line to a local station on one of the roads constituting the line, is unlawful, merely because the delivering road is allowed its local rate as its proportion of the joint through rate.

162 U. S., pp. 184, 191, 192, C. N. O. & T. P. Ry. vs. I. C. C.

LXIII.

The "Augusta Southern" Case did not Decide that Combination Rates are Illegal.

Counsel for the appellee may also refer to the "Augusta Southern R. R." case, 74 Fed. Rep., 527, as holding that com-

bination rates are illegal. The legality of "combination rates" was not discussed by the Court in that case. The Wrightsville & Tennille R. R., which was one of the roads involved in that case, *was not the delivering carrier.* It was an intermediate carrier, and its service was, in the strictest sense, "through" service. It received the cars at one end of its line, and surrendered them at the other end; *without incurring any of the expense or delay incident to delivery at local stations.*

My information is that the rate discussed by the Court in that case was on phosphate from Charleston, via Augusta, and Tennille to Oconee River landings.

The total rate was.....		$4 20
It was divided as follows:		
To the roads running from Charleston to Tennille, 326 miles (5½ mills per mile).	$1 80	
To the Wrightsville & Tennille R.R., 36 miles (22 mills per mile).....	80	
To the boats on the Oconee River.....	1 60	— $4 20
The proportion of the Wrightsville & Tennille R.R. added to that of the boats amounted to.....	$2 40	

The Wrightsville & Tennille R.R. had for a long period of time joined with the Augusta Southern R.R., as well as with the Central Railroad, in making through rates on phosphate; and it had accepted from each of them 80 cents as its reasonable proportion of the through rate.

Its local rate from Wrightsville to Tennille was $1.16. It withdrew from its connection with the Augusta Southern R.R. and proposed to charge that road its local rate of $1.16, which added to the boat's proportion of $1.60, made the total proportion from Tennille to the Oconee River landings $2.76, instead of $2.40, as it had previously been. The Court held that as $2.40 had been previously accepted from the Augusta Southern R.R. as reasonable, and as it was still accepted from the Central R.R. as reasonable, the presumption was that the increased rate of $2.76 was unreasonable as a charge against the Augusta Southern R.R.—especially as the former charge of $2.40 was continued to be accepted from the Central R.R.

The question in that case was as to the right of a railroad to discriminate as between two of its connections as to the proportion which it would demand out of a through rate. *There was no question as to whether the through rate was reasonable as between the through line and a shipper.*

In the case at bar, counsel, in effect, contends that the S. C. & Ga. R. R. shall be compelled to accept a less rate per ton per mile on the short haul from Augusta to Summerville than competition forces the through line to accept on the long haul from Memphis to Charleston. But in the Augusta Southern Railroad case, the Court allowed the Wrightsville & Tennille R. R. to continue to charge its old rate of 80 cents for 36 miles, which rate was four times as much per ton per mile as was charged by the connecting roads from Charleston to Tennille; and the only effect of the order in that case was to prohibit the Wrightsville & Tennille R. R. from increasing its proportion from 80 cents to $1.16, as against the Augusta Southern R. R., while it continued to accept 80 cents from the Central R. R.

LXIV.

The Fact that Rates Are What is Known as "Agreed Rates," is no Proof that They Are Not the Result of Competition.

Counsel for the appellee may contend that as all of the lines running from Memphis to Charleston charge the same rates to Charleston, and as those rates are what are known as "agreed rates," there is no real competition between those lines at Charleston. Or, to state it differently, that instead of there being competition at those points, there is an agreement *not* to compete.

This position is inconsistent with another position which I have assumed would be taken by counsel, and which I have discussed in Section XXXII of this argument. In the first position, reference is made to the fact that at the time the Act to Regulate Commerce was passed, and prior thereto, and since, the greater charge for the shorter than the longer haul

only existed in cases of competition at the longer distance points, and the argument was anticipated that, as Congress knew that fact, it did not intend that competition should be an excuse, except in certain *extreme* cases, etc.

In that position, the contention would be that competition is the sole cause for charging less for a longer than for a shorter distance; while in the position now under consideration, the contention is that there is no competition at all at the longer distance points.

Certain traffic agreements between competing railroad companies were considered by this Court in U. S. vs. Trans-Missouri Freight Association, 166 U. S., p. 290; and U. S. vs. Joint Traffic Association, 19 Sup. Ct. Rep., p. 25. The agreements before the Court in those cases were held to be violative of the Anti-Trust Act; because their effect was to *increase* the rates at the points which they affected.

In the case at bar, no complaint would be made of the rates to Summerville, if the rates to Charleston could be *increased* so as to be not less than the Summerville rates.

As held by this Court, the object of Traffic Association agreements was to restrain within certain limits the competition which existed at the points affected; and which competition the carriers claimed was ruinous in its effect.

The very fact that such agreements were made, is the best evidence that competition did exist at the points affected; because the very object of such agreements was to restrict that competition, so that it would not become any more severe.

LXV.

If the Failure to Charge According to Distance Constitutes an Undue Preference, all Rates will have to be made on a Mileage Basis.

Counsel for the appellee may contend that, inasmuch as the order of the Commission is simply that the rates to Summer-

ville shall not be higher than those to Charleston, it may be complied with by giving to Summerville, rates as high as those to Charleston; and that this privilege or option given to carriers to make the rates to Summerville as high as to Charleston, *thus ignoring the natural advantage of the former in being the shorter distance point*, is all that can be asked by the carriers, *and is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case.*

If the Commission had the legislative power to prescribe rates to be charged in the future, as it at one time claimed to have, I could understand such an expression as "the Commission ignoring the natural advantages of shorter distance points."

With an arbitrary rate-making power at its command, it could, with impunity, ignore the natural, or commercial advantages of any city in the Union, and there would be no practical relief, however capricious its action might be.

But, as the Commission has no legislative power, and must act as a quasi judicial tribunal, what right has it to "ignore the natural advantages" of shorter distance points, if they have the legal right to enjoy those advantages?

I have shown in Section XLIX of this argument that if it constitutes unjust preference in favor of Charleston to charge less rates to that place than to Summerville, it constitutes unjust prejudice against Summerville to charge *as high* rates to Summerville as to Charleston; and that if distance is to be the controlling factor, the rates to Summerville, and to Charleston, respectively, as well as all other rates, must be constructed *on a mileage basis.*

If Summerville is entitled to have its rates constructed on a mileage basis, neither the Commission nor the Court has the right to "ignore its natural advantage," in being the shorter distance point.

But if it be held that Summerville is entitled to have its rates constructed on a mileage basis, every other city and station in the United States has the same right; and all rates in this country must be constructed on that basis.

Neither the Commission, nor the Court, has any more power than a railroad, to subject Summerville to any unjust prejudice; and if it is entitled to have rates constructed on a mileage basis, the Commission and the Court, as well as the railroads, should say so, and not "ignore its natural advantage" by subjecting it to rates *as high* as those to Charleston.

When counsel contends that the privilege given the carriers to charge to Summerville rates as high as those to Charleston, "is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case," he concedes that a dissimilarity of conditions *has* resulted from that competition; and yet he fails to explain why it would be a reasonable allowance for that dissimilarity to permit the carriers to charge to Summerville rates *exactly as high* as those to Charleston, and yet not one cent higher. It is quite easy to make such assertions, but quite impossible to suggest any intelligible reason in support of them.

In Section XXXIV of this argument I showed that it is practically impossible to construct rates upon any "scale of comparison between the dissimilarity of conditions and the disparity of rates;" and it is equally impossible to affirm, with any basis of reason to support it, that a certain relation of rates constitutes "a reasonable allowance for dissimilarity of conditions resulting from competition."

It is easy enough to make the *assertion* that a certain relation of rates constitutes "a reasonable allowance for dissimilarity of conditions resulting from competition;" but such an assertion, if made by a quasi judicial tribunal, should be supported by some good reason.

The legislative department has the power to arbitrarily declare that any particular relation of rates shall *be deemed* to be reasonable; whether it be reasonable in fact, or not—provided it does not amount to confiscation of the carrier's property.

Congress has the power to arbitrarily declare that all interstate rates shall be made upon a mileage basis; though it may not be able to assign a reason for doing so.

So, Congress has the power to arbitrarily declare that under no circumstances or conditions, shall a greater charge be made for a shorter, than for a longer distance; though it may not be able to assign a reason for its action.

But when a quasi judicial tribunal declares that all interstate rates shall be made upon a mileage basis; or that under no circumstances or conditions shall a greater charge be made for a shorter than for a longer distance, it must be able to show *that rates made otherwise than as directed by the tribunal, violate some provision of the Act to Regulate Commerce.*

Congress has the power to arbitrarily declare that the rates to Summerville shall be not higher than the rates to Charleston; and it may do so without being able to assign any reason for its action. But before this Court can be asked to judicially declare that the privilege given the carriers to make the rates to Summerville *as high* as to Charleston "is a reasonable allowance for any dissimilarity of conditions resulting from the competition shown in this case," the Court must be furnished by counsel with some good reason to support the declaration.

Every reason that can be assigned to show that the Summerville rates should not be higher than the Charleston rates, can be assigned to show that the Summerville rates should be lower than the Charleston rates; and lower in the exact proportion that the Summerville mileage is less than the Charleston mileage.

But as such a course of reasoning would lead to the requirement of mileage rates all over the country, this Court is not asked by counsel to follow the reasoning to its inevitable conclusion.

LXVI.

The Case of Union Pacific Co. vs. Goodrich.

Counsel for the appellee may refer to a statement in the opinion of this Court in the case of Union Pacific Co. vs.

Goodrich, 149 U. S., p. 680, to the effect that the Act to Regulate Commerce was designed to "cut up by the roots the entire system of rebates and discriminations in favor of particular localities, special enterprises, and favored corporations."

The word "rebates" as used by the Court manifestly refers to "special rebates" mentioned in section 2 of the Act to Regulate Commerce, and which are prohibited only when they are given to one person, and refused to another, where the service to both is rendered under substantially similar circumstances and conditions.

The word "discriminations" as used by the Court manifestly refers to "*unjust* discriminations" mentioned in said section; because this Court has held that the act prohibits only such discriminations or preferences "as are *unjust* and *unreasonable*."

145 U. S., pp. 276, 277, I. C. C. vs. B. & O. R.R.

LXVII.

THE ORDER MADE BY THE COMMISSION IN THIS CASE IS NOT LAWFUL UNDER THE SECOND SECTION OF THE ACT.

The second section of the Act to Regulate Commerce is:

"That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust

discrimination, which is hereby prohibited and declared to be unlawful."

24 U. S. Stat. at Large, pp. 379, 380.

The second section was construed by this Court, in Wight vs. U. S., 167 U. S., pp. 516–518. In that case, a railroad company charged one shipper a higher rate than another shipper for the carriage of beer from the same place of shipment (Cincinnati) to the same place of destination (Pittsburg). The Court held that the phrase "under substantially similar circumstances and conditions," *as used in the second section*, refers to the matter of carriage, and does not include competition. The Court said that it was the purpose of *the second section* to enforce equality between shippers, and to prohibit "any rebate or other device by which two shippers, shipping over the same line, *the same distance*, under the same circumstances of carriage, are compelled to pay different prices therefor."

As Summerville and Charleston are not the *same distance* from Memphis, the second section has no application.

LXVIII.

THE ORDER MADE BY THE COMMISSION IN THIS CASE IS NOT LAWFUL UNDER THE FIRST SECTION OF THE ACT.

The first section enacts that all charges "shall be reasonable and just."

24 U. S. Stat. at Large, p. 279.

Mr. Justice Brown, in delivering the opinion of this Court, in the case of I. C. C. vs. B. & O. R. R., said:

"That a charge may be perfectly reasonable under section 1, and yet may create an unjust discrimination, or an unreasonable preference, under sections 2 and 3."

145 U. S., 277, I. C. C. vs. B. & O. R. R.

81 Fed. Rep., p. 804, Kinnavey vs. Terminal R. Assn.

I have shown in Section LXVII of this argument that the second section has no application; and I have shown in Sections XLIV to LXVI that the disparity in rates in this case does not constitute an unreasonable preference under Section 3. I shall therefore now consider the question as to whether there is sufficient evidence in the record in this case to justify this Court in decreeing that the rates to Summerville are not reasonable within the purview of the first section of the Act.

In the case of Ames vs. U. P. Ry. Co., Mr. Justice Brewer used this language:

"But the grave question still remains, are the rates prescribed in this Act as the maximum over which the railroad companies may not go, unreasonable, and so unreasonable as to justify the court in staying its operation? *No more difficult problem can be presented than this.* There are so many matters which enter into it, and which must be taken into consideration, before a satisfactory answer can be reached."

64 Fed. Rep., 173, Ames vs. U. P. Ry. Co.

In the same case, reported under the style of Smyth et al. vs. Ames (known as the "Nebraska Freight Rate Case"), this Court said: "How such compensation may be ascertained, and what are the necessary elements in such an inquiry, will always be an embarrassing question."

169 U. S., p. 546.

In the case of U. S. vs. Freight Association, 166 U. S., p. 331, Mr. Justice Peckham used this language:

"What is a proper standard by which to judge the fact of reasonable rates? Must the rates be so high as to enable the return *for the whole business* done to amount to a sum sufficient to afford the shareholder a fair and reasonable profit upon his investment? If so, *what is a fair and reasonable profit?* That depends sometimes upon *the risk incurred,* and the rate itself differs in different localities; which is the one to which reference is to be made as the standard? Or is the reasonableness of the profit to be limited to *a fair return upon the capital that would have been sufficient to build and equip the road, if honestly expended?* Or is still another standard to be

created, and the reasonableness of the charges tried by *the cost of the carriage* of the article, and a reasonable profit allowed on that? And in such case would *contribution to a sinking fund to make repairs upon the roadbed and renewal of cars*, etc., be assumed as a proper item? Or is the reasonableness of the charge to be tested by reference to the *charges for the transportation of the same kind of property made by other roads similarly situated? If the latter, a combination among such roads as to rates would, of course, furnish no means of answering the question. It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation.*"

The italics are mine.

166 U. S., pp. 331, 332.

See also 81 Fed. Rep., pp. 551, 552, Van Patten vs. C. M. & St. P. Ry. Co.

In the case of Smyth et al. vs. Ames et al., Mr. Justice Harlan said:

"We hold, however, that the basis of all calculations as to reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be *the fair value* of the property being used by it for the convenience of the public. And in order to ascertain that value, the *original cost of construction*, the amount expended in *permanent improvements*, the *amount and value of its bonds and stock*, the *present, as compared with the original, cost of construction*, the probable *earning capacity* of the property under particular rates prescribed by statute, and the sum required to meet *operating expenses*, are all matters for consideration, and are given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."

Smyth et al. vs. Ames et al., 169 U. S., pp. 546, 547.

In the cases which have involved the question as to the *reasonableness* of rates, "labyrinths of tables, figures, and esti-

mates," were presented in the testimony, discussed by counsel in their briefs, and considered by the Courts with the closest scrutiny and greatest patience, as will be seen by reference to the opinions in :

64 Fed. Rep., pp. 179 to 194, Ames vs. U. P. Ry. Co.
78 Fed. Rep., pp. 263–275, Southern Pacific Co. vs. Board of R.R. Comrs.
154 U. S., pp. 402–413, Reagan vs. Farmers' Loan & Trust Co.
169 U. S., p. 466, Smyth et al. vs. Ames et al.

In the case at bar, there will not be found in the testimony any sufficient evidence of the various and numerous facts suggested by Justices Peckham and Harlan as proper to be considered in determining what are reasonable rates. Nor will there be found any sufficient evidence of the various and numerous facts that were actually considered by the courts in determining what were reasonable rates in the cases cited above.

I submit, therefore, that the evidence is wholly insufficient to enable this Court to intelligently decide that the rates to Summerville are unreasonably high in and of themselves.

The Commission did not decide that the rates to Summerville were unreasonably high. On the contrary, it based its decision entirely upon the fourth section; and treated the matter of "*unreasonable*" rates as irrelevant.

Trans., p. 20.

LXIX.

The Burden is on the Appellee to Prove that the Summerville Rates are Unreasonable.

In the case of Harding vs. C. St. P. M. & O. R. Co., decided in 1887, which was one of the earliest cases decided by the Commission, the Commission held that "on a petition charging the exaction of *unreasonable* rates, *the burden of proof is on the petitioner* to sustain the charges by evidence which shows, with reasonable certainty that they are in substance true."

See 1 I. C. Rep., p. 375.

In the case of Brewer & Hauleiter vs. Louisville & Nashville R.R. Co., decided in 1897, and which is one of the latest cases decided by the Commission, the Commission reiterated the doctrine that the burden of proving that a rate is in and of itself *unreasonable* is upon the complainant.

See 7 I. C. Rep., p. 234.

LXX.

A Railroad Company is Entitled to a Fair Return Upon the Value of that Which it Employs for the Public Convenience.

In the case of Ames vs. U. P. Ry. Co., Mr. Justice Brewer said:

"The foundation of the idea of reasonableness is justice. That which is unjust cannot be reasonable; and when the strong arm of the Legislature is laid upon property invested in railroad transportation, it must be so laid as to do justice to such investors. There can be no justice in that which works to such investors a practical destruction of their property, thus invested. It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. Railroads are not like stages or steamboats, which, if furnishing no profit at one place, and under one prescribed rate of transportation, can be taken elsewhere, and put to use at other places and under other circumstances. The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed. The protection of property implies the protection of its value."

64 Fed. Rep., 176, 177, Ames vs. U. P. Ry. Co.

"Justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others."

154 U. S. 412, Reagan vs. Farmers' L. & T. Co.

"What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience."
Smyth et al. vs. Ames et al., 169 U. S., p. 547.

I have shown in Section XXI of this argument that for the year ending June 30th, 1892, there was an actual deficit of $58,479.55 *in the operation* of the S. C. & Ga. R.R.

So far from that company receiving "a fair return upon the value of that which it employs for the public convenience," it actually paid $58,479.55 for the privilege of serving the public.

While the order of the Commission is technically confined to a reduction of the rates on hay and other commodities from Memphis to Summerville, the practical effect of the order is to require the S. C. & Ga. R.R. to reduce all of its local rates, to and from all of its local stations, so that they shall, in no case, exceed the proportions which that railroad receives from through rates charged upon freight traffic passing over its road.

I have shown in Section XXI of this argument that such a reduction would amount to an annual loss of $206,584.68 on the freight traffic *alone;* that it would increase the annual deficit to $265,064.23; and that it would practically ruin the company.

LXXI.

The Schedule Must be Considered as a Whole.

In order to ascertain whether a railroad company has, during any given period, received any compensation for the use of its property, it is necessary to know the results of its operations *as a whole.* The result of its operations as to any particular article, as hay, coal, pig iron, etc., is of no value; because, though it may have carried those articles at or even under cost, other articles carried by it may have yielded more than a reasonable profit.

And so, though it may have carried some articles at rates which, looked at by themselves, would appear to be excessive, yet when considered in connection with low rates charged on other articles, the volume of traffic carried by it, taken as a whole, may be found to be insufficient to yield a fair return upon the value of the road.

In the case of the Chicago & N. W. Ry. Co. vs. Dey, Mr. Justice Brewer said:

"Coming now to the question of the schedule as presented, I remark that the schedule, *as a whole*, must control, and its validity or invalidity *does not depend upon the sufficiency or insufficiency of the rates for any few particular subjects of transportation.*"

35 Fed. Rep., p. 881, C. & N. W. Ry. Co. vs. Dey.

In the case of Chicago, etc., Ry. Co. vs. Minnesota, Mr. Justice Miller, in a concurring opinion, said:

"That the proper, if not the only, mode of judicial relief against the tariff of rates established by the Legislature or by its Commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fares as excessive, or establishing its right to collect the rate as being within the limit of a just compensation for the service rendered."

"That until this is done, *it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the question which ought to be settled in this general and conclusive method.*"

134 U. S., p. 460, Chicago, etc., Ry. Co. vs. Minnesota.

In its Eleventh Annual Report, the Commission states that the classifications now in use in this country embrace from 5,000 to 7,000 items.

11 Ann. Rep., I. C. C. (1897), p. 66.

How would it be possible for any tribunal to ascertain what would be a reasonable rate upon one of those items; as for instance, hay, coal, or pig iron, without taking into consideration any of the remaining five or seven thousand articles?

In the case at bar, the Court is asked to decide what is a reasonable rate from Memphis to Summerville, on hay, and "other commodities," without even specifying what the "other commodities" are.

It is evident that the S. C. & Ga. R. R. carries a certain amount of traffic that originates elsewhere than at Memphis; and that it carries a certain amount of traffic that is not destined to Summerville.

And yet, the Court is asked to single out the hay, and "other commodities" destined to Summerville alone, from Memphis alone, and to decide what are reasonable rates on said hay and "other commodities," without regard to what may have been the results of the operations of the S. C. & Ga. R. R. under its schedule taken "as a whole."

LXXII.

It is not Fair to Compare Competitive Rates with Non-Competitive Rates.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens said:

"Nevertheless, a reference to the Memphis rate is of value in determining whether the rates to Chattanooga are reasonable rates, it appearing that, though the distance is nearly one-third greater than to Chattanooga from the East, rates are accepted for the Memphis business, considerably less than those at Chattanooga."

85 Fed. Rep., pp. 111, 112.

In that case Memphis was one of the longer distance points, and Chattanooga was the shorter distance point. The Com-

mission held, in that case, that the water competition at Memphis was such as to create dissimilar circumstances and conditions, and therefore that in charging less to Memphis than to Chattanooga, the carriers did not violate the fourth section of the Act. But, though the Commission declined to grant relief to Chattanooga as against Memphis, under the *fourth* section, yet according to Judge Severens, the Commission could and should have used the Memphis rate as evidence under the *first* section, that the shorter distance rates to Chattanooga were unjust and unreasonable.

In other words, his Honor held that it is fair to compare competitive rates with non-competitive rates, in order to test the reasonableness of the latter.

In order that his Honor's argument may be placed fully and fairly before the Court, I make the following additional quotations:

"The question whether the rates are just and reasonable in themselves is in some measure a relative one, that is to say, it may be tested by a comparison of the particular rates with those accepted elsewhere for a *similar* service, etc." . . .

"It seems to me clear, that the charges accepted for the longer haul may be referred to for the purpose of considering the reasonableness of the charges made for the shorter haul."

85 Fed. Rep., p. 114.

"Such comparisons are applied to every other kind of business, and the fact that there may be competition in such business would not be a controlling consideration, for the presumption would always be that the compensation charged for the service is sufficient to be reasonable."

85 Fed. Rep., p. 115.

"If, as I gather from the testimony, the through rates to Nashville (another of the longer distance points in that case) afford a fair profit to the carrier, whether the Northern Trunk Lines or the Respondents (and it is reasonable to suppose they would not engage in the business without it), there is substantial ground for contending that the same charge for carrying

freight from the East to Chattanooga would afford a reasonable profit, and would therefore be a reasonable charge."

85 Fed. Rep., p. 115.

The majority of the Court of Appeals in the case at bar took the same view as Judge Severens, and said:

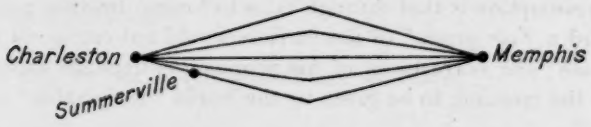
"The rate from Memphis to Charleston on hay and grain, and like products, is reasonable, and is shown by the evidence to be remunerative; it is fair to presume that it would not have been made by the railroad, unless those controlling it were satisfied that it would be so," etc.

Trans., p. 132.

It will be noticed that the argument, which runs through the opinion of Judge Severens, as well as the opinion of the majority of the Court of Appeals in the case at bar, is:

First: That it is fair to presume that the carriers would not accept the rates which they do accept on longer distance competitive traffic, unless such rates were reasonably remunerative; and

Second: That whatever rates to the longer distance points are reasonably remunerative, the same rates to the shorter distance points must, *a fortiori*, be reasonably remunerative.



The above diagram represents five competing lines, extending from Memphis to Charleston. The competition between said lines would naturally be severe and very effective. It would necessarily result in very low rates. And the rates would be remunerative only in the sense that they yield a slight profit over the additional cost of carrying that particular traffic.

Such rates might be called reasonably remunerative *for com-*

petitive traffic; because, as is well known, competitive rates do not generally yield more than a slight profit over the additional cost of the movement of competitive traffic. But the fact that such rates may be reasonably remunerative for the competitive traffic passing between Memphis and Charleston is no evidence that they are reasonably remunerative for the non-competitive traffic passing between Memphis and Summerville.

Suppose it should be shown that merchants are constantly in the habit of selling salt, domestics and other staple articles at one per cent. profit. It would be perfectly fair to compare the rates charged by one merchant upon *those* articles with the rates charged by another merchant *in the same town* upon the *same articles;* for it would be right to assume that if, for any reason, one merchant could afford to sell those articles at a certain profit, another merchant in the same town could afford to sell at the same profit; and the fact that the profits of both merchants on those articles were controlled by competition would not alter the case. But would it be fair to compare the profit which those merchants accepted on salt, domestics, etc., with their profit on fancy imported articles, and foreign dress goods? *In a word, it is fair to compare competitive rates with competitive rates; and it is fair to compare non-competitive rates with non-competitive rates; but it is not fair to compare competitive rates with non-competitive rates.*

When Judge Severens says that: "The presumption would always be that the compensation charged for the service or thing is sufficient to be *reasonable;*" and when he says that the presumption is that through rates to longer distance points "afford a *fair* profit" or the carriers would not engage in the business; the correctness of his proposition depends entirely upon the meaning to be given to the words "reasonable" and "fair."

It may be said that a profit of one per cent. on salt, domestics and other staple articles is a "reasonable" and "fair" profit on those articles, or merchants "would not engage in the business." And the profit *is* in fact "fair" and "reasonable;" *provided the merchant be allowed to charge higher profits upon fancy imported articles, dress goods, etc.* A merchant is compelled to carry certain staple articles in stock in order to draw customers for his higher priced goods; and he can "fairly"

and "reasonably" accept extremely low rates of profit upon his staple goods, rather than deplete his stock of such articles, and thereby drive away his custom. But if by the words "fair" and "reasonable," Judge Severens means that because a merchant accepts one per cent. profit upon staple articles, the presumption is that it is a fair and reasonable profit to be charged *upon all other articles sold by him;* and that he ought not to be allowed to exceed that profit upon any other article; then I respectfully dissent from his proposition. Any such rule of law administered in a case where a merchant was suing for articles sold and delivered, and no price had been previously stipulated, would destroy the mercantile business of this country. No court would think of charging a jury in a suit brought by a merchant to recover for the value of an imported lace shawl sold by him, that the jurors must, in ascertaining its value, restrict the merchant to the same rate of profit upon the shawl, as that which he accepts on domestics and other staple articles.

LXXIII.

There is no Such Presumption as that Competitive Rates are Reasonably High.

The proposition of Judge Severens, and of the majority of the Court of Appeals, referred to in the last preceding section of this argument, is plausible, and apparently logical, but in reality sophistical.

It may be put in syllogistic form, as follows:

1. Rates charged by a carrier to a longer distance point must be reasonably high, or they would not be accepted.

2. The rates charged by the appellants to the shorter distance point in this case are higher than the rates charged by them to the longer distance point.

3. Therefore, the rates charged by them to the shorter distance point are *un*reasonably high.

The fault in the syllogism is to be found in the major premise. And it consists in stating a fact as being true under all circumstances, which, though it may be true under certain circumstances, is not true under other circumstances, and is not true under the circumstances of the particular case, in which the syllogism is invoked.

A similarly faulty syllogism would be the following:

1. Men are black.
2. George Washington was a man.
3. Therefore George Washington was black.

If a railroad has no competition to contend with, its own interests will induce it to charge according to distance.

In that case, rates charged by it to a longer distance point may properly be presumed to be reasonably high; and in that case, the major premise of the syllogism would be true.

But where severe competition exists at the longer distance point, whether the competition be between market and market, or between product and product, or between carrier and carrier, the presumption instead of being that the rates to that point are reasonably *high*, is that they are lower than might be reasonably charged, were it not for such competition.

In the case of Smyth et al. vs. Ames et al., this Court quoted the following from Mr. Justice Brewer:

"It must be remembered that these roads are competing roads; *that competition tends to a reduction of rates*—sometimes as the history of the country has shown, *below that which affords any remuneration to those who own the property.*"

Smyth et al. vs. Ames et al., 169 U. S., p. 542.

In its Eleventh Annual Report, the Commission says:

"Rates to competing and distributing centers are not for the most part unreasonably high; they are frequently *quite low.*"

11 Ann. Rep., I. C. C. (1897), p. 14.

LXXIV.

If Competitive Rates are to be Used as a Standard for Fixing non-Competitive Rates, the Rates on Low-Class Traffic will have to be Used as a Standard for Fixing Rates on High-Class Traffic.

To illustrate my meaning:

By reference to the tariff of the Erie & Western Transportation Co., Trans., p. 103, it will be seen that the lake and rail first-class rate from Chicago to Boston is 67 cents per hundred pounds, while the fifth-class rate is only 23 cents per hundred pounds.

Now, if the low competitive rates from Memphis to Charleston are to be used as a standard for fixing rates to the non-competitive stations on the S. C. & Ga. R.R., why is it that the low rate from Chicago to Boston on 5th class freight is not to be used as a standard for fixing the rates from Chicago to Boston on the first four classes of freight? Why cannot the argument be made, that if transportation companies have, for a long series of years, carried traffic, known as 5th class, from Chicago to Boston for 23 cents per hundred pounds, the presumption is that it has afforded them "a fair profit," or "they would not engage in the business;" and if 23 cents per hundred pounds affords "a fair profit" for carrying 5th class freight from Chicago to Boston, the higher rates charged by them from Chicago to Boston upon the first four classes of freight must be unreasonably high? And yet, if any one should seriously contend that the carriers of this country ought to be compelled to charge on the lower classes of traffic as high rates as are charged on the higher classes, the contention would be regarded as preposterous.

It is certain, however, that precisely the same fact which compels carriers to accept exceedingly low rates between *all* points on the *lower* classes of traffic, compels them to accept

exceedingly low rates between *competitive* points on *all* classes of traffic; and the sole compelling fact in both cases is competition. The reason why low-class traffic can only pay very low rates is because of competition between *product and product*. Wheat shipped from the Northwest to Boston comes into competition with wheat grown nearer the sea-coast; and therefore wheat from the Northwest must be carried at a sufficiently low rate to enable it to compete in Boston with wheat that is grown nearer to Boston. Again, if the rate charged upon wheat, added to its cost at the place of production, makes the selling price of wheat in Boston too high, as compared with corn, rye, etc., the amount of wheat consumed at Boston will diminish, and the deficit will be made up from corn, rye or other grain. In a word, the only reason why exceedingly low rates are charged upon the lower classes of traffic is that *competition* between *product and product* compels it; the only reason why rates to Charleston on all the classes are less than rates to the local stations on the S. C. & Ga. R.R. is that competition between carrier and carrier, and between market and market, which exists at Charleston, but does not exist at said local stations, compels it. If competition is to have the effect to raise competitive rates to the level of local rates, it should also have the effect to raise the rates on low-class traffic, to the level of high-class rates.

LXXV.

If Rates to Longer Distance Points Pay Anything over the Additional Cost of the Movement of the Long Distance Traffic, there is no "Loss" to be Made up on the Local Traffic.

I have heretofore commented upon the proposition that the presumption is that rates charged by carriers to longer distance points yield a reasonable profit, and therefore that higher rates charged to shorter distance points must yield an unreasonably high profit.

Counsel for the appellee may contend for another proposition, which Judge Severens apparently approved, and which is

entirely different from, and inconsistent with, the proposition upon which I have heretofore commented.

The other proposition may be put in syllogistic form as follows:

1. Rates charged to longer distance competitive points do *not* yield reasonable compensation for the service performed by the carrier.

2. The loss sustained by the carrier on traffic to longer distance competitive points is made up by increasing the rates to shorter distance points.

3. Therefore carriers ought not to be allowed to charge less for a longer than for a shorter distance over the same line, in the same direction, etc.

The first fault in this syllogism is to be found in the major premise; and it is the fault of indefiniteness. How are we to decide what is a "*reasonable*" compensation for transportation to a *competitive* point?

My contention is, that if *competitive* rates pay anything over and above *the additional cost of movement* of the competitive traffic, it is right and *reasonable* that they be accepted by the carrier; rather than abandon the competitive traffic.

On the other hand, counsel for the appellee may contend that *competitive* rates ought to be sufficient to pay not only the *additional cost of movement* of the competitive traffic, but also the proportion of "operating expenses," "fixed charges," etc., which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier.

Such proposed method of rate construction is correct in theory; and it would be followed by every railroad traffic manager in the country, if it were practicable to do so. But the utter impracticability of constructing rates upon the theory contended for by counsel was demonstrated by the Commission itself in 1887, In re Southern Railway & Steamship Association (sometimes cited as In re Louisville & Nashville Railroad Co.). In that case the Commission said:

"This distinction between *the cost of movement* and the *fixed charges* often becomes of importance in such cases as that of the lumber trade just mentioned. That trade is new; the roads which take it were built without anticipating its springing up, and their managers made their calculation for business to meet the whole cost of operation in reliance upon such traffic as was then apparent or probable. The *fixed charges* of the road may, for purposes of illustration, be assumed to equal one-half of the whole, *the cost of movement* of freight the other half. The rates laid were doubtless calculated to cover the whole, with a margin for profit, and were so laid that all traffic would contribute toward both *fixed charges* and *cost of movement*. But now comes this new business, and from the nature of the case low rates are a necessity to it; it can pay perhaps little if anything more than half what is paid by other traffic. But taking it will not increase perceptibly *the fixed charges* of the road because those are made up of the items that must be paid whether the traffic is large or small. What is added to the cost by taking it *is simply the expense of its own handling and movement;* and upon the supposition made, there might perhaps be gain to the road instead of loss, in taking it at anything above half the rates which are levied upon other traffic *corresponding to its classification. It might, therefore, be carried at such rates without wrong to any one.*"

1 Interstate Commerce Rep., p. 284, right col., In Re Southern Ry. & S. S. Association.

What is said by the Commission with reference to the lumber trade, is equally applicable to all the lower kinds of freight, such as iron ore, stone, sand, brick, cement, pig iron, etc. If the courts once hold that each and every kind of traffic must be charged such rates as will pay not only the "additional expense incurred" by the carrier in the transportation of that particular kind, but also the full proportion which such traffic ought to contribute toward all the operating expenses, and fixed charges of the carrier, then the courts will put an absolute embargo upon more than half of the tonnage now carried by the railroads of this country.

The Commission in its First Annual Report to Congress said:

"It was very early in the history of railroads perceived that if these agencies of commerce were to accomplish the greatest practicable good, the charges for the transportation of different articles of freight could not be apportioned among such articles by reference to the cost of transporting them severally, for this, if the apportionment of cost were possible, would restrict within very narrow limits the commerce in articles whose bulk or weight was large as compared with their value. On the system of apportioning the charges strictly to the cost, some kinds of commerce which have been very useful to the country, and have tended greatly to bring its different sections into more intimate business and social relations, could never have grown to any considerable magnitude, and in some cases could not have existed at all, for the simple reason that the value at the place of delivery would not equal the purchase price with the transportation added."

See First Annual Report Interstate Commerce Commission (1887), p. 30.

What is said by the Commission with reference to the impracticability of apportioning the charges for the transportation of different articles of freight among such articles by reference to the cost of transporting them, severally, is equally applicable to the theory that the charges for the transportation of competitive and non-competitive freight ought to be apportioned between them by reference to the cost of transporting them, severally. The reason why low-grade traffic cannot be made to pay in proportion to the cost of its transportation, is, as the Commission properly states, because the charge for carriage would be greater than it could bear. And the reason why competitive traffic cannot be made to pay in proportion to the cost of transporting it, is, because the charge for carriage upon that basis by the longer line would ordinarily be greater than by the shorter line; the longer line would be driven out of competition; the shorter line would secure a monopoly; and all competition would be destroyed.

The second fault in the syllogism referred to above in this section is to be found in the minor premise. In that premise it is erroneously assumed that a *loss* is sustained by the carrier on traffic to longer distance competitive points. But if competitive rates pay anything over and above the additional

cost of movement, so far from there being any *loss* to carriers on traffic to the longer distance points, there is a "margin of *profit*" *in carrying that traffic to longer distance points.* In other words, *there is no loss at all.* The real ground of objection is, that the margin of profit is not as great as it should be. The answer to the objection is, that if there is no *loss* upon the traffic carried to longer distance points, the carriage of that traffic has no tendency whatever to increase the rates to the shorter distance points. On the contrary, the profit, however small it may be, which the carriers may derive from the longer distance traffic, enables them to improve and increase their facilities for handling the shorter distance traffic, as well as the other traffic on their lines.

The third and greatest fault in said syllogism is to be found in the conclusion which is sought to be drawn from the major and minor premises.

If it were true that rates charged to longer distance competitive points do not yield proper compensation; and if it were true that their failure to do so causes a loss which the carrier tries to make up, by increasing the rates to the shorter distance points, it is manifest that if the rates to the shorter distance points be reduced to the same as the rates to the longer distance points, the loss to the carrier will be increased instead of being diminished. In other words, if the Courts compel carriers in the Southern territory to accept to all of their stations, rates as low as those which competition compels them to accept to the longer distance competitive points, the result must be the universal bankruptcy of the Southern railway system.

LXXVI.

Railroad Officials do Not "Have Everything Their Own Way." Their Rates are Made for Them by Competition.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says:

"But it is to be remembered that the railroad business of the country is conducted by able men, animated, as it is right to suppose, with the desire to promote the interests of those whom they serve. Further to promote the efficiency of their work, the officers of the various companies have their associations for the purpose of comparing, studying and adjusting the rates of traffic on their several lines. *In the absence of the other party, they have everything their own way.* It would be expecting something not encountered or expected in other branches of business if we anticipated that they would assume a judicial attitude toward those with whom their business is to be done."

85 Fed. Rep., p. 112.

Judge Severens is correct in saying that railroad traffic managers are animated with the desire to promote the interests of those whom they serve. But experience has taught them that the most effective way to promote those interests is to promote the interests of the patrons of their roads. This is not attributing to railroad officials any charitable or benevolent motive. On the contrary, it is conceding that they are intelligently selfish.

The error of Judge Severens consists in the statement that railroad traffic managers in studying and adjusting the rates of traffic on their several lines act "in the absence of the other party," and that "they have everything their own way." The error is quite a popular one, and it grows out of a want of familiarity with the practical method of rate-making in this country. *At the present day it cannot be said that railroad traffic managers make their rates at all.*

So far as rates to and from *competitive* points are concerned, they are fixed inexorably, and absolutely, by competition. A traffic manager has nothing to do but to ascertain the rates which his rivals are offering to accept, and adopt, or closely approximate those rates, or abandon the competitive traffic.

As to rates to and from local stations, a railroad traffic manager in many of the States, is restricted by State railroad commissioners; in every State he is restricted by competition between product and product, and between market and market;

which kinds of competition have a controlling influence upon the rates that can be charged to and from even the most strictly local stations, on a road. To illustrate: Cotton is raised on the lines of the Georgia R. R. and the S. C. & Ga. R. R., and it is shipped from many of the local stations on those roads. But that cotton is raised and shipped in competition with cotton raised upon other railroads in Georgia and South Carolina; and in competition with cotton raised upon railroads in other States. The traffic managers of the Georgia R. R. and the S. C. & Ga. R. R. must accept such rates on cotton from their local stations as will enable that cotton to be carried and sold in the markets of the world in competition with cotton raised upon the lines of other railroads in Georgia, South Carolina, and other States, or the cotton cannot be moved at all. In that event the Georgia R. R. and the S. C. & Ga. R. R., will lose the revenue that they might otherwise realize from the transportation of cotton from their local stations.

Again: If the cost of producing cotton, added to a certain rate charged for transportation, exceeds the price which can be obtained for cotton in the market, the cotton will not move from the local stations; and said railroads will lose the revenue which they might otherwise realize from its transportation. It is necessary, therefore, that the traffic manager acquaint himself, not only with the rates which other railroads are accepting for the transportation of cotton for similar distances, but also with the cost of producing cotton, and with the price at which it is selling; and this he cannot do without full consultation with the farmer who raised the cotton, and the merchant who buys it. The same is equally true of corn, wheat, and other grain, of live stock, and, in fact, of everything produced along the line of a railroad and shipped from its local stations. Whenever any of those products are offered for shipment at a local station, they are offered with a full knowledge that their transportation must be conducted in competition with the transportation by other railroads of similar products, destined to common or competing markets; and such competition is as controlling, though not in the same degree, as that which exists at those cities where numerous rival lines of transportation intersect.

The Commission, in speaking of classifications made by railroad associations, says:

"But in these associations, when in session for the making of rates, each railroad official has, to some extent, had the district which was served by his road behind him; he has felt the pressure of the interests there, and contended for them as against the interests in classification represented by others, not only because it was desirable that the roads should favor the policy its patrons favored, but also *because the same policy was likely to be beneficial to both.*

"The result necessarily is that a classification made by a railroad association represents a series of compromises, *to which not only the railroads are parties, but in a certain sense business interests and sections of country also; these in many cases being admitted by their representatives to the consultations upon a subject so vitally concerning their interests, and allowed to present their views.*"

1 Ann. Rep., I. C. C. (1887), p. 31.

In an extract from Senate Report No. 1394, Finance Committee, second session, Fifty-third Congress, published by the Government under the title "Wholesale Prices, Wages and Transportation," it is said that:

"These are the general rules under which classifications are constructed, and while to a large extent controlling, classifications are, notwithstanding, in a great measure a series of compromises, *the participants of which are not alone the railroads, but also the shippers and representatives of business interests throughout the country, the latter being afforded ample opportunity to join with the railroads in the discussion as to the proper classification of articles of shipment affecting their interests.*"

Wholesale Prices, Wages and Transportation, p. 404.

Judge Severens is therefore in error, when he states that traffic officers in "studying and adjusting the rates of traffic on their several lines," act "in the absence of the other party and have everything their own way."

LXXVII.

Railroads do Not, and Cannot "Even up Their Profits" by Increasing Local Rates.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens says:

"If railway carriers engage in a competitive struggle for business at a place where they meet and underbid each other, or other carriers, to a point which is not in itself remunerative, can they turn back on the line, and taking advantage of the conditions existing at other localities, arising either from the fact that there is no opportunity for competition, or from the fact that by concert of the carriers there is none, charge such rates for the shorter haul as shall make good their lack of profit in competitive business, and even up the profits on their whole business to the point they set before themselves as reasonable? To the proposition thus roundly stated, no doubt counsel for the carriers would say that they could not contend for it, and yet this is the result reached by the not very indirect steps of the argument."

85 Fed. Rep., p. 115.

I respectfully deny that the argument of "counsel for the carriers" either directly or indirectly leads to any such proposition as the Judge stated so "roundly."

I have heretofore stated what I regarded as the reasonable limitations imposed upon carriers in exercising the privilege of taking into consideration competition as one of the circumstances and conditions affecting transportation; and one of the limitations conceded by me was that the rates accepted by carriers on traffic to the longer distance competitive point *must yield some profit* (though it may be very small) over the additional cost of the movement of that traffic. The limitation is directly opposed to the idea that carriers may "engage in a competitive struggle" . . . "to a *point which is not in itself remunerative.*" If the rates accepted to the longer distance competi-

tive points yield *any* profit over *the additional cost of the movement of that traffic*, they are "remunerative" to some extent, though the remuneration may be very slight.

Another limitation heretofore conceded by me, is that the rates charged by carriers to the shorter distance point must not be unjust or unreasonable, within the purview of the first section of the Act. If it be necessary that those rates be just and reasonable, within the purview of that section, it is impossible for the carriers "to turn back on the line" and "take advantage" of the conditions existing at such points. If the rates to the shorter distance points be in fact just and reasonable, the carriers, in charging them, are in no sense "taking advantage" of the persons who pay them. If the rates charged by the carriers to the longer distance competitive points are remunerative to any extent, however small it may be, there is no "loss" sustained by the carriers in the transportation of the longer distance traffic; and therefore there is no occasion for them to "even up," by increasing their shorter distance rates.

If Judge Severens means that railroads must charge at competitive points, the same rate of profit as is charged at non-competitive points, then they must abandon competitive traffic altogether. If he means that railroads must accept upon non-competitive traffic whatever rate of profit they may be forced to accept upon competitive traffic, then the Southern railroads must go into bankruptcy; because they can no more afford to carry all of their traffic at the low rate of profit which they are forced to accept at competitive points, than a merchant can afford to sell his entire line of goods at the same rate of profit which he is forced to accept upon certain staple articles.

LXXVIII.

The Power of this Court to Modify the Order made by the Commission.

Counsel for appellee may contend that this Court may modify the order of the Commission, or make such new or

different order as, under the law and "the entire body of the evidence" may, in the judgment of the Court, be just and proper.

In the case of I. C. C. vs. Detroit, G. H. & M. Ry. Co., it was said by Judge Severens in his dissenting opinion, as follows:

"The Court is not authorized to make any general order or decree upon the matters at large as they shall appear before it, but is given power simply to award its process if it judicially approves the order of the Commission. If it does not find it to have been warranted by law, its power and duty are at an end."

57 Fed. Rep., 1013, 1014.

He also used the following language: "But, as already said, the Court can make no new order. The order of the Commission stands or falls as made."

57 Fed. Rep., p. 1019.

See, also, 83 Fed. Rep., p. 267, Farmers' Loan & Trust Co. vs. N. P. Ry. Co.

The proposition thus announced by Judge Severens was affirmed by the U. S. Circuit Court of Appeals for the Sixth Circuit, in 74 Fed. Rep., p. 805. The fourteenth head-note of the opinion of that Court is as follows:

"The power given to the courts to compel obedience to the 'lawful order' of the Commission being special and statutory, is strictly limited to the power conferred; and consequently the courts can only grant or refuse compulsory obedience to the order, and have no authority to modify or change it."

74 Fed. Rep., p. 805, D. G. H. & M. Ry. Co. vs. I. C. C.

In the case of I. C. C. vs. D. L. & W. R. Co. et al., in the Circuit Court for the Northern District of New York, Wallace, Circuit Judge, in speaking of the power of the Circuit Court, said:

"The Court cannot substitute, for an order actually made, one such as the Commission might or should have made, or

such as the Commission intended to, but failed to, make. This Court has no revisory power over the orders of the Commission. Its function in a proceeding like this is merely to inquire whether the respondents, the common carriers, have refused or neglected to perform any lawful order or requirement of the Commission. It cannot undertake to decide whether the respondents have violated one which the Commission might have lawfully made."

I. C. C. vs. D. L. & W. R. Co., 64 Fed Rep., p. 723.

Counsel for appellee may refer to the following language in the opinion of this Court in what is known as the "Social Circle case:"

"The Commission denied the power of this Court to hear the case upon any other issues, pleadings, or facts, than those presented to the Commission. It is claimed that the case is to be determined with reference to what the Interstate Commerce Commission had before it, and that no additional issues or questions should be raised, *or other evidence taken.* The language of the act of Congress does not support this contention. . . . This question may be considered, therefore, as settled, not only by the language of the act of Congress, but by authority, against the position assumed by counsel for the Commission."

I. C. C. vs. C. N. O. & T. P. Ry. Co., 56 Fed. Rep., pp. 934, 935.

In the "Social Circle case," counsel for the Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in that case. The question with reference to which the language just quoted was used by the Court, was whether the Circuit Court, in its examination into the legality of an order, as made by the Commission, was restricted to the pleadings and evidence used before the Commission, or could consider new and additional evidence taken for the first time in the Circuit Court.

Counsel for appellee may quote the following language from the opinion of this Court in the case of Interstate Commerce

Commission vs. Alabama Midland Ry. et al., 168 U. S., p. 175, viz:

"It has been uniformly held by the several Circuit Courts and the Circuit Courts of Appeal in such cases that they *are not restricted to the evidence addiced before the Commission*, nor to a consideration merely of the power of the Commission to make the particular order under question, but that *additional evidence may be put in by either party*, and that the duty of the Court is to decide, as a Court of Equity, upon the entire body of evidence."

It is true of the "Alabama Midland case," as it is true of the "Social Circle case," that Counsel for the Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in either of those cases. The question with reference to which the language above quoted was used by the Court in both cases, was, whether the Circuit Court, in its examination into the legality of an order as made by the Commission, was restricted to the pleadings and evidence used before the Commission, or could consider new and additional evidence taken for the first time in the Circuit Court.

Counsel for appellee may quote the following language from the opinion of Judge Sage in I. C. C. vs. C. N. O. & T. P. Ry. Co. et al., known as the "Cincinnati and Chicago Freight Bureau cases," viz:

"The Court is to sit as a court of equity, without the formal proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises. It is so provided in section 16 of the act. The intention of Congress evidently was to vest in the Court a large discretion."

64 Fed. Rep., pp. 984, 985.

In those cases, counsel for Commission did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in those cases. The question with reference to which the language above quoted

was used by the Court, was whether the Circuit Court, in its examination into the legality of an order as made by the Commission, could consider a transcript of the testimony taken before the Commission, as a part of the record. See 64 Fed. Rep., p. 983. His Honor held that though the testimony taken before the Commission was not a part of the record, either party should be allowed to use as evidence any testimony taken before the Commission, which is competent and relevant. Such action was regarded by the Court as a proper exercise of the "large discretion" vested in it by the Act; and it was considered by the Court as doing "justice in the premises" to allow either party to use the testimony taken before the Commission, though it was not technically a part of the record. The question as to whether the Court had power to modify an order made by the Commission, or to make a new order of its own, was not discussed by counsel nor considered by the Court in those cases.

Counsel for appellee may quote the following language used by Judge Lurton in the case of Shinkle Wilson & Kreis Co. vs. L. & N. R.R. Co. et al., 62 Fed. Rep., p. 693, viz:

"If it shall then appear, on all the evidence heard and submitted, that the order of the Commission *was lawful* and reasonable, and that it has been violated, it shall be lawful for such Court to issue a writ of injunction, or other proper process, to prevent further disobedience of such order. Now, it is well settled that the Court is not the mere executioner of the orders of the Commission. The suit in this Court is an original and independent proceeding. This Court is not confined to a mere examination of the matter as heard by the Commission. It proceeds to hear the complaint *de novo*."

In that case, counsel for the complainants did not assume the position that the Circuit Court had the power to modify an order made by the Commission, or to make a new order of its own. No such question was involved in that case. The question with reference to which the language just quoted was used by the Court, was whether the Court was bound to issue a *preliminary* injunction to compel a carrier to obey an order made by the Commission in reference to freight rates, where

the answer of the carrier denied that said rates were unreasonable or unjust, and denied the legality of said order.

Counsel for appellee may quote the following language from the opinion of this Court in the case of I. C. C. vs. Alabama Midland Ry. Co. referred to above:

"Much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be *reviewed* by the Court. The provisions of section 16 of the Act, which authorize the Court to 'proceed to hear and determine *the matter* speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner *as to do justice in the premises*, and to this end, such court shall have power, if it think fit, to direct and prosecute in such mode and by such persons as it may appoint, all such inquiries as the Court may think needful, to enable it to form *a just judgment in the matter of such petition*,' extend as well to an inquiry or proceeding *under the fourth section* as to those arising under the other sections of the Act."

The italics are mine.

In using the language just quoted, this Court was not discussing the question as to whether the Circuit Court can modify or change an order as made by the Commission; and therefore, it had no idea of disapproving the proposition announced by Judge Severens, and affirmed by the Court of Appeals in the case of I. C. C. vs. D. G. H. & M. Ry. Co. referred to above.

In using the language just quoted from the opinion in the Alabama Midland Ry. case, the Supreme Court was merely combatting an argument which had been pressed upon that court by counsel for the Commission to the effect that *under the fourth section*, the action of the Commission was conclusive, and could not be reviewed by the courts at all. This Court decided, however, that the power of *review* by the courts extends "as well to an inquiry or proceeding *under the fourth section*, as to those arising under the other sections of the Act."

168 U. S., p. 174.

The power of "*review*" referred to by this Court, is confined to a "review" of the question as to whether the order as made by the Commission is lawful. If upon such a "review," the Court finds that the order is lawful, it awards its process to enforce it. If upon such "review," the Court finds that the order as made is not warranted by law, the power and duty of the Court are at an end.

"*The matter*" which the Court is authorized to "*hear and determine*," and "*the premises*" in which the Court is to "*do justice*," and "*the matter of such petition*" in which the Court is "to *form a just judgment*," all mean one and the same thing, viz., "to hear and determine," and "to form a just judgment" on the question whether the order *as made by the Commission, is lawful*, or not.

The sixteenth section of the Act to Regulate Commerce provides that whenever any common carrier shall refuse or neglect to perform "any *lawful* order or requirement of the Commission," the Commission, or any one else, may apply to the Circuit Court of the United States, and said court "shall have power to hear and determine the matter" "speedily as a court of equity," "in such a manner as to do justice in the premises." The Court may prosecute all such inquiries as may be needful to enable it "to form a just judgment in the matter of such petition;" and if it be made to appear to such court on such hearing or on report of any such person or persons, that the *lawful* order or requirement of said Commission drawn in question, has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction," etc.

It will be seen that the jurisdiction of the Circuit Court, *under section* 16, is confined to the enforcement of a LAWFUL order made by the Commission; and that said court is not authorized to make a new order of its own.

I concede that the Commission may assign an erroneous reason for making an order, and yet the order may, for other reasons, be lawful; and that, in such case, it is the duty of the Court to enforce it; but I contend that the Court has no power to enforce an order of the Commission which is *not* lawful; or

to make an order of its own, under section 16, which is *substantially* different from the order made by the Commission.

Under sections 8 and 9 of the Act to Regulate Commerce, any one who complains that the Act has been violated by a common carrier is given an action for damages in the courts of the United States. But if instead of resorting to those courts, he elects to apply to the Commission, as he may do under section 16, he must be prepared to maintain the *lawfulness* of such order as the Commission may make in his behalf; or he cannot demand of the Circuit Court an enforcement of the order.

Section 9 provides that any person shall have the right to pursue his remedy in court, or his remedy before the Commission; but that he shall not have the right to pursue both remedies. According, however, to the contention of counsel for the appellee a party may elect to apply to the Commission, and having obtained an order from it he may, under section 16, apply to the Court for an enforcement of the order; and notwithstanding the Court may be of the opinion that the order of the Commission is unlawful, it is the duty of the Court to give to the party all the relief to which he would have been entitled, if he had, in the first instance, applied to the Court under sections 8 and 9 of the Act. If the contention of counsel be correct, the party, instead of being forced to elect between the Commission and the Court, obtains the advantage of the jurisdiction of the Court, as well as that of the Commission.

In the case of I. C. C. vs. E. T. V. & G. Ry. Co. et al., Judge Severens did not hold that the Court had the right to "modify the order of the Commission" or to make a "new or different order" of its own. Speaking of the order made by the Commission in that case, he said:

"The legal reason given may be wrong and the order right, if, upon the facts, the latter (i. e., the order) should be found by the Court TO BE WARRANTED BY LAW. Nor would it affect the duty of the Court if the Commission had founded its order upon one provision of the Act, and the facts brought the case within some other. THE QUESTION, THEREFORE, IS WHETHER THE ORDER

MADE WAS A LAWFUL ONE *in the circumstances as they are made to appear.*"

85 Fed. Rep., p. 110.

In the case just cited, Judge Severens did not "modify the order of the Commission," nor did he make a "new or different order" of his own. On the contrary, he "ordered, adjudged, and decreed that *the order* MADE BY THE INTERSTATE COMMERCE COMMISSION be in all things affirmed and made the order of this Court," etc.

Respectfully submitted.

ED. BAXTER,
Solicitor for Appellants, as of Record.

No. 244 October Term 1898

Louisville & Nashville R.R. Co. et al. Appts. vs. Henry W. Kehlher. Appellee.

Filed Mar. 28, 1899.

SUPREME COURT OF THE UNITED STATES

October Term, 1898.

No. 244.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., Appellants,

vs.

HENRY W. KEHLHER, Appellee.

APPEAL

FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

Additional Argument of ED. BAXTER, Solicitor for Appellants, as of Record.

SUPREME COURT OF THE UNITED STATES

October Term, 1898.

No. 244.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY, ET AL., Appellants,

vs.

HENRY W. BEHLMER, Appellee.

APPEAL

FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

Additional Argument of ED. BAXTER, Solicitor for Appellants, as of Record.

Since my argument was filed in this case, the United States Circuit Court of Appeals for the Fifth Circuit has decided the cases of The Interstate Commerce Commision v. The Western & Atlantic Railroad Company, et al.; Same v. The Clyde Steamship Company, the Georgia Railroad, et al.; and Same v. The Clyde Steamship Company, The Atlanta & West Point Railroad Company, and the Western Railway of Alabama, et al.; and I submit as an appendix to my argument in this case a copy of the Opinion of the Circuit Court of Appeals in the cases mentioned.

Respectfully submitted,

ED. BAXTER,

Solicitor for Appellants as of Record.

United States Circuit Court of Appeals,

FIFTH CIRCUIT.

NOVEMBER TERM, 1898.

No. 750.

THE INTERSTATE COMMERCE COMMISSION, *Appellant*,

v.

THE WESTERN AND ATLANTIC RAILROAD CO., ET AL., *Appellees*.

No. 751.

SAME v. THE CLYDE STEAMSHIP COMPANY, THE GEORGIA RAILROAD, ET AL.

No. 752.

SAME v. THE CLYDE STEAMSHIP COMPANY, THE ATLANTA & WEST POINT RAILROAD COMPANY, AND THE WESTERN RAILWAY OF ALABAMA, ET AL.

Appeals from the Circuit Court of the United States for the Northern District of Georgia.

Before PARDEE and MCCORMICK, Circuit Judges, and PARLANGE, District Judge.

MCCORMICK, Circuit Judge, delivered the opinion of the Court.

The three above-styled causes present substantially similar questions of fact and questions of law. They were heard together in the Circuit Court and in this Court. They were severally originated by petitions filed before the Interstate Commerce Commission against the respective appellees by the Railroad Commission of Georgia. These petitions were filed on October 22, 1891.

The gravamen of the petition in the first-named of the above cases was, that the appellees charged, collected, and received for freight transportation, by continuous carriage, from the city of Cincinnati and other Ohio river points to the towns and stations of Marietta, Acworth, Cartersville, Kingston, Adairsville and Calhoun, on the Western and Atlantic Railroad, a greater amount than the amount charged and received for freight carried through the towns and stations just named to the city of Atlanta; that the rate of freight charged to the shorter distance points is unreasonable and discriminating in its nature, and is in direct violation of Section 4 of the act of Congress entitled "An act to regulate commerce," and prays that the defendants therein (appellees here) may be required to answer, and after due hearing and investigation an order may be made commanding them to cease and desist from the violations of the act to regulate commerce.

In the second suit, the same charges and prayer are made as to the rates of the defendants (appellees) from New York and other eastern cities to points on the Georgia Railroad between Augusta and Atlanta, to-wit: Greensboro, Madison, Social Circle, Covington and Stone Mountain, being the shorter-distance points in that case, and Atlanta the longer-distance point.

In the third complaint the same charges and prayer are made as to the rates of the defendants (appellees) from New York and other eastern cities to points on the Atlanta and West Point Railroad and the Western Railway of Alabama between Atlanta and Opelika, to-wit: Newnan, Grantville, Hogansville, LaGrange, and West Point being the shorter-distance points in that case, and Opelika the longer-distance point.

The Interstate Commerce Commission, after due service of these complaints on the defendants therein, and after testimony taken and argument had in behalf of all parties in interest, made its report and decision November 11, 1892, in which it

held in substance in each of the cases, that all of the carriers, as presented in the cases, are subject to the act to regulate commerce, and to the jurisdiction of the Interstate Commerce Commission as to through shipments from Cincinnati, New York, Philadelphia, Boston and Baltimore; or from any Ohio river or Mississippi river point, or any Atlantic port north of Charleston, and that they had no right to put in the higher rate for the shorter-distance, upon their own motion, but should have made application to the Commission for relief under the provisory clause of the fourth section; and are technically not now entitled to make defense to the complaints. After discussing the facts in the first case, the Commission says: "In view of these facts, and others shown in the statement of findings, we hold that the defendants are not, upon the evidence, justified in making the greater charges complained of in this case. But this being the first case since the Louisville & Nashville decision in which the Commission has been called upon to specifically hold that relieving orders must be applied for in this class of cases, we think the carriers should have an opportunity in this case of applying for relief under the proviso of the fourth section, and, if possible, of bringing forward voluntarily, as applicants instead of defendants, additional evidence that may be admissible under such a proceeding as indicated in this opinion. The order will therefore be that the defendants in this case cease and desist, within twenty days after receiving a copy thereof, from charging or receiving any greater compensation in the aggregate for the transportation of a like kind of property from Cincinnati or other points called and known as Ohio river points for the shorter distance to Calhoun, Adairsville, Kingston, Cartersville, Acworth or Marietta, than for the longer distance over the same line in the same direction to Atlanta, the shorter distance being included within the longer distance, or, that the defendants make and file with the Commission within the time above specified an application or applications, as the case may require, as provided in the proviso of the fourth section of the Act to

Regulate Commerce, for relief from the operation of that section in respect to the prohibition therein contained against charging or receiving any greater compensation in the aggregate for the transportation of like kind of property from Cincinnati and other Ohio river points to the shorter-distance points above mentioned, than for such transportation over the same line in the same direction for the longer distance to Atlanta, and show cause within 60 days after service of the order why such application for relief should be granted; and upon such application the evidence already taken in this case may be used. In case the application for relief shall be denied the order to cease and desist shall stand, and compliance therewith will be required within twenty days after service of the order denying the application."

A substantially similar finding and order was made in each of the two other cases.

The appellees did not apply for relief as permitted by the order, and did not change their tariff or rates to the shorter or longer distance points named.

On May 27, 1893, the bills in these cases were exhibited in the Circuit Court for the Northern District of Georgia, and, by appropriate averments therein, the proceedings had before the Commission and its decision and order thereon, and the failure of the appellees to comply therewith were presented to the court, and prayer was made that such action and orders be taken as were necessary to secure a speedy hearing and determination of the matters and things stated, and that pending the proceedings a writ of injunction or other proper process, mandatory or otherwise, to restrain the defendants, their officers, servants and attorneys from further continuing in their violation of and disobedience to the order of the Commission, be granted, and that upon final hearing such injunction may be made perpetual.

The case did not come to a speedy hearing. On July 6, 1898,

a decree was entered in each case by which the relief sought was refused and the bill dismissed. From those decrees, these appeals are taken.

It is manifest from the report and opinion of the Interstate Commerce Commission that these cases were considered and decided by it as cases presenting violations of the fourth section of the act to regulate commerce. The Commission was not, therefore, called upon to find whether the respective rates in question were reasonable and just, or not. For the same reason, it was not called upon to find whether the rates charged to the shorter-distance points gave an undue or unreasonable preference or advantage to the longer-distance points, or subjected the shorter-distance points to an undue or unreasonable prejudice or disadvantage in any respect whatever. As underlying the provisions of the fourth section, the relative effect of the respective rates is more or less discussed in the report and opinion of the Commission, but it does not appear to have made, nor to have intended to be understood as making, any finding of fact in reference to these rates that would affect their relation to any section of the act to regulate commerce other than the fourth section, on which its opinion and decision proceeds and rests. Without conceding this, counsel for the appellant contended in the Circuit Court, and contends in this Court, that on applications like these the courts are not limited to a review of the grounds on which the Commission acted, but have, and should exercise, jurisdiction of the whole subject matter, and on the law and facts determine whether the tariff of rates complained of is reasonable and just or not, and whether it gives any undue or unreasonable preference to the longer-distance points, or subjects the shorter-distance points to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. The appellees contend that their tariff of rates complained of does not violate the fourth section, because the circumstances and conditions under which they carry freight to the shorter-distance points

and to the longer-distance points are not substantially similar but are substantially dissimilar. They contend, further, that their tariff of rates does not violate the third section for substantially the same reason as exempted them from the operation of the fourth section, and that any preference the tariff gives to the longer-distance points, or prejudice or disadvantage in any respect whatsoever to which it subjects the shorter-distance points, is not undue or unreasonable, but the just and reasonable result of the substantial dissimilarity in conditions and circumstances under which the freight is carried and delivered to the different points, respectively. They also deny that the rates complained of are unreasonable or unjust, and insist that they are in themselves reasonable and just.

In the case of the Interstate Commission v. Alabama Midland Ry., 168 U. S. 144, the Supreme Court say: "That competition, is one of the most obvious and effective circumstances that make the conditions under which a long and a short haul is performed subtantially dissimilar—and as such, must have been in the contemplation of Congress in the passage of the act to regulate commerce—has been held by many of the Circuit Courts. It is sufficient to cite a few of the number: Ex parte Koehler, 31 Fed. Rep. 315; Missouri Pacific Ry. v. Texas & Pacific Railway, 31 Fed. Rep. 862; Interstate Commerce Commission v. Atchison, Topeka, etc., Railroad, 50 Fed. Rep. 295; same v. New Orleans & Texas Pacific Railroad, 56 Fed. Rep. 925; Behlmer v. Louisville & Nashville Railroad, 71 Fed. Rep. 835; Interstate Commerce Commission v. Louisville & Nashville Railroad, 73 Fed. Rep. 409. . . . . .

But the question whether competition as affecting rates is an element for the Commission and the courts to consider in applying the provisions of the act to regulate commerce, is not an open question in this court. . . . . .

To prevent misapprehension it should be stated that the conclusion to which we are led by these cases, that in applying the

provisions of the third and fourth sections of the act, which make it unlawful for common carriers to make or give any undue or unreasonable preference or advantage to any particular person or locality, or to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under subtantially similar circumstances and conditions, for a shorter than for a longer distance over the same line in the same direction, competition which affects rates is one of the matters to be considered—is not applicable to the second section of the act. . . . . .
In order further to guard against any misapprehension of the scope of our decision, it may be well to observe that we do not hold that the mere fact of competition, no matter what its character or extent, necessarily relieves the carrier from the restraints of the third and fourth sections; but only that these sections are not so stringent and imperative as to exclude in all cases the matter of competition from consideration in determining the questions of undue or unreasonable preference or advantage, or what are substantially similar circumstances and conditions. . .
We are unable to suppose that Congress intended by the fourth section, and the proviso thereto, to forbid common carriers, in cases where the circumstances and conditions are substantially dissimilar, from making different rates until and unless the Commission shall authorize them so to do; much less do we think that it was the intention of Congress that the decision of the Commission, if applied to, could not be reviewed by the courts."

The Commission's report says that the present adjustment of rates to Atlanta is the outcome of severe competition between lines leading from the competing markets like St. Louis, Baltimore, Cincinnati, etc., and, with some modifications occurring from time to time, has been in effect for a considerable period. While it makes no similar finding with reference to Opelika showing whether or not the adjustment of rates to that point is the outcome of severe competition, either between carrier and

carrier or between market and market, its recitals of what the proof shows as to conditions there are to that effect, and the testimony of numerous credible witnesses is clear and pointed to the effect that the adjustment of rates to Opelika is the outcome of controlling competition. It is true that with reference to both points, the force of this competition has been recognized by the respective appellees, and its influence has by agreement between them been so adjusted as to fix the rates to each of these points; but witnesses showing thorough competency to testify to the fact, state that this adjustment of the rates has been brought about and is maintained by the force of the competition bearing upon those points. It is argued by counsel for the appellant that by this agreement as to rates, the carriers have contracted to not compete. But it is not shown or reasonably suggested on what ground or for what consideration the competing carriers consented to accept a lower rate to these longer distance points than they charge to the shorter distance points, if they could just as well have agreed and contracted to charge as great or greater rates to the longer than to the shorter distance points.

A careful consideration of the circumstances and conditions shown by the proof constrains to the conclusion that the difference in the circumstances and conditions has caused the difference that is complained of in the rates. The Commission in its report says: "Competition has not forced rates down at Kingston, Marietta, and Cartersville." These are junction points reached by more than one railroad. No railroad other than the Western & Atlantic runs to Calhoun, Adairsville or Acworth. Some of the shorter-distance points between Augusta and Atlanta, and between Atlanta and Opelika, have more than one railroad reaching them, but the proof shows that at none o' them is there such competition as affects rates, or, to use the language of the Commission, "as has forced rates down."

In these cases, the Circuit Court found that the rates complained of do not violate the fourth section of the act to regulate

commerce; that the lesser charge to the longer-distance point results from dissimilar circumstances and conditions brought about by competition, and does not give a preference which is undue and unreasonable to the longer-distance point; and that there is nothing whatever in the evidence or in the record from which it can be justly concluded that the rates to any of the local points named are not reasonable and just. (88 Fed. Rep. 186.)

The most careful consideration of the testimony brought up in the records in these cases does not disclose any evidence that was offered by the appellant in the Circuit Court tending to show that the rates, separately considered, to the respective points are not reasonable and just; and the replies that were drawn by a most skillful cross-examination from the witnesses called by the appellees, do not show or tend to show that the rates to the respective points are not reasonable and just. On the contrary, the great volume of testimony given by these witnesses (who show full competency to testify) is directly and clearly to the effect that the rates are reasonable and just. One witness gives as a reason for this opinion (for the subject is hardly susceptible of better proof than the opinion of experts), that the rates are fixed upon the lowest obtainable combination of the rates to competitive points with the local rates therefrom to the non-competitive points, so that the traffic to the non-competitive stations has the benefit of whatever reduction competition has effected in the adjustment of rates to the competitive points; and that the rates are lower than prevail in some of the other sections of the country, and lower than can be obtained by any other means of transportation, and are not higher than are charged from other points of distribution to stations on other railroads under similar circumstances and conditions. And, another witness says, the rates are "just and reasonable, in that they are not unjustly or unreasonably high. They are lower than the rates at which the property can be transported by any

other means of transportation. They have not prevented the shipment of freights. Traffic has been shipped with profit under these rates. They are just, relatively, to rates to other points in the State of Georgia similarly situated. These rates are based upon rates to Chattanooga, which are controlled and fixed by competition, and added to the rates from Chattanooga to the several stations, which are the same for the same distance as the rates fixed by the Railroad Commission of Georgia." These reasons do not convince the counsel for the appellant, but appear to us to have weight. The testimony also shows (and it has become largely a matter of common knowledge) that competition between carriers, whether by rail or by water, not only affects the rate for which freight can be carried, but also substantially affects the circumstances and conditions under which the transportation of freight is conducted. By way of illustration, one witness says, it will and does require a road to run trains at a high rate of speed. It requires the carrier frequently to have cars loaded to a less weight per car. It often requires the carrier to take a part of a carload without waiting to fill up the car. It will frequently require the road to be less rigid in resisting the payment of claims made against it, the payment of which the company might successfully resist, and would stoutly contest at a non-competitive point. The doing of all of these things, and many more like them not necessary to be done in the absence of competition, is rendered necessary by the presence of such competition, to the degree in which it is present, in order that the carrier may get its share of the business at the competitive point. The testimony shows that the rates of freight from the Ohio river points to Atlanta are entirely controlled by competition. The points between Chattanooga and Atlanta get the benefit of the strong competition at Chattanooga, but there is not at those points the same force of competition which controls the rates at Atlanta. The testimony of the witnesses and the report of the Commission show that Opelika is not situated on any watercourse, and is at the intersection of only two railways, but that

it is affected by certain conditions which happen to exist at that point, and which are not to be found at ordinary local stations or even at ordinary junctions. With its two railroads as terminal carriers, it is connected at comparatively short distances with numerous and extensive systems of rail and water carriage which make it possible for freight to reach Opelika from the northern and eastern ports, and from Ohio river points, by many different routes, the strong competition between which different carriers comes to a focus at Opelika. Counsel for the appellees concedes, that in taking into consideration competition as one of the circumstances and conditions affecting transportation, care must be had to keep within reasonable limits. He submits that, in these cases, the reasonable limits are three: (1) that the rates charged to the shorter-distance points must not be unjust or unreasonable within the purview of the first section of the act to regulate commerce; (2) that the competition at the longer-distance points must be such as subserves the public interest; it must also be real, and such as to compel the acceptance by the carriers of the rates which they do accept to those points; and (3) that the rates to the longer-distance points must yield a profit (though it may be very small) over the additional cost of the movement of the competitive traffic. He contends that, if the rates to the shorter-distance points are just and reasonable the appellees ought not to be required to reduce them, even though such reduction may be necessary to place the shorter-distance points upon a "rate equality" with the longer-distance points, because such a reduction in rates to the shorter-distance points involves a serious reduction in the revenue which the appellees derive from the present rates to those points. If the competition at the longer-distance points is real and such as to affect rates, the carrier must accept those rates or abandon the competitive traffic. If the competitive rates are something more than the additional cost of the movement of the traffic it is to the interest of the carrier and to the interest of the public that the carrier should be allowed to compete for the traffic. The profit, however small, to

the extent that it inures, increases the revenues of the carrier, and has a tendency to reduce local rates and to improve the local service. There may be a wide difference between a rate or amount of compensation that would give full remuneration for the service in carrying the competitive traffic and that remuneration therefor which the competitive conditions will allow the carrier to receive. The full measure of reasonable remuneration to the appellees for the carriage of competitive freight to Atlanta would require a rate sufficient to pay not only the additional cost of moving the competitive traffic, but also that proportion of operating expenses, fixed charges, and reasonable profit to the owners of the carrier lines which the tonnage of the competitive traffic bears to the total freight tonnage of the carrier. And that rate would, doubtless, be applied and enforced if the circumstances and conditions permitted it to be done. But as no higher rate than a full compensatory one should be applied and enforced under the most favorable circumstances and conditions, it is manifest that it cannot be applied to traffic that is subject to severe competitive conditions.

There is in these cases no complaint by the appellant, or by any of the witnesses whom the appellant called, that the rates to Atlanta, Opelika, Chattanooga, Augusta and other competitive points are too low. There is a suggestion by the Commission, that the average of the rate per ton per mile tends to show that such complaint could not well be made, and that these rates are at least reasonably high. And the testimony offered by the appellees shows that, considering the competitive conditions in operation at those points, the rates to those points are reasonably remunerative. On the basis of this evidence it is earnestly contended by counsel for the appellant that the rates at the longer distance points being shown to be reasonably remunerative and the rates at the shorter distance points being admitted to be higher, the latter must of logical necessity be found to be unreasonably high, and, therefore unreasonable and unjust, and

such as give an undue preference to the longer-distance points, and subject the shorter-distance points to an undue and unreasonable prejudice and disadvantage. It will be perceived that this argument excludes all consideration of the force of competition, and ignores its presence at the longer-distance points and its comparative absence from the shorter distance points. What is a reasonable action, or a reasonably remunerative rate for carriage at a given time and place, necessarily has relation to the circumstances and conditions bearing upon the actor or upon the carrier at the time and place. The appellant does not say—and the Railroad Commission of Georgia did not say, and none of the witnesses called by the appellant in the cases have said—that the rates at any of the points, considered separately, are too high or too low, or are not reasonable and just. The burden of their complaint is that the relation between the rates is wrong. It is not insisted or even suggested that the rates to the longer-distance points should or can be raised. Nor is it now asked that the rates to the shorter-distance points shall be lowered. It is asked only that the appellees shall be required to cease and desist from charging more for the shorter than for the longer haul. This requirement seems to have possible relation only to the fourth section of the act. It cannot adequately meet the requirements of the first and third sections, if either of them is violated by the conduct from which the appellees are required "to cease and desist." If the mere charging of a greater rate for the shorter than for the longer haul gives an undue and unjust preference to the longer-distance points and subjects the shorter-distance points to any undue prejudice or disadvantage, it is difficult to see how the charging exactly the same rate for the shorter haul that is charged for the longer shall escape condemnation.

The appellees are held to be subject to the act and to the jurisdiction of the Commission, because by express or implied agreement they have consented to carry freight on through bills of

lading from points beyond the State of Georgia to points within that State. The sixth section of the act to regulate commerce, as originally passed and as since amended, recognizes the existence and validity of such contracts or agreements, express or implied, and makes certain provisions with reference to the action of the connecting carriers parties thereto. The act does not, however, require such connecting carriers to enter into such agreements. Nor does it authorize the Commission to require through routing and billing, or to establish and fix through rates over connecting lines. Gulf, etc., Railway Company v. Miami Steamship Company, 52 U. S. App., 732; New York, New Haven & Hartford Railroad Company v. Platt, 7 Interstate Com. Rep., 323. It does not authorize the Commission to fix rates in any case. Cincinnati—New Orleans & Texas Pacific Railway Company v. Interstate Commerce Commission, 162 U. S., 184.

The Railroad Commission of Georgia is authorized, and required, to fix rates. Sec. 6, Act 269, Part 1, Title 12, of Georgia (1878–1879). And that commission has fixed a schedule of just and reasonable rates, which is called the Standard Tariff. Only three roads—the Western & Atlantic, the Rome Railroad (operated by the Western & Atlantic), and the Georgia Railroad—are required to observe this Standard Tariff of rates. All of the other roads in the State are allowed certain percentages of increase, except on classes C, D, F, J, and P, and are allowed to charge rates from ten to fifty per cent. higher than the Standard Tariff rates. The Western & Atlantic Railroad, extending from Chattanooga to Atlanta, does not lie wholly within the State of Georgia, but being owned by the State of Georgia and now operated by the Western & Atlantic Railroad Company under a lease from the State, is subject throughout its whole extent to the rates imposed by the Georgia commission. The competition which affects rates is at least as severe at Chattanooga as it is at Atlanta. Some of the witnesses depose that it is stronger at Chattanooga, by reason of the influence there of the Tennessee

river. Various systems of connecting lines lying north and west of Chattanooga are affected by this strong competition, which has its controlling influence throughout the whole length of their lines from Ohio river points to Chattanooga, on all freight carried to that point or to be carried through it; and hence they cannot claim more or be forced to receive less for carriage to that point than the competitive conditions there require.

For like reasons, the Western & Atlantic Railroad Company cannot obtain more for the carriage of this competitive freight from Chattanooga to Atlanta than the difference between the rates to Chattanooga and the rates to Atlanta, which have been fixed by competition beyond the control or appreciable influence of the Western & Atlantic Railroad. Therefore, as to that competitive traffic, this road has no option as to the rate at which it will take the traffic, and must either decline to receive the freight or must accept for its carriage the difference between the two rates, which are fixed by the controlling competition. As to the intermediate stations on the Western & Atlantic Railroad, that carrier is under not the same duress, but feels its force to the extent that for carrying the competitive freight in question from Chattanooga to Marietta it cannot charge the full rate allowed by the Georgia Commission, for if it insisted on doing so the freight could and would go by another route to Atlanta; and thus, instead of getting a haul of one hundred and seventeen miles, the distance from Chattanooga to Marietta, the Western & Atlantic could get only a haul of twenty-one miles, the distance from Atlanta to Marietta.

Therefore, in fixing the rates to these intermediate points, the through rate to that competitive point, which combined with the local rate from the competitive point to the point of destination will give the lowest through rate to the non-competitive point, controls. As the non-competitive point thus gets the benefit of the lowest rate to any of the neighboring competitive points; and as the carriage of the competitive traffic to the respective

competitive points is remunerating to the carriers to an extent that more than pays the expense of moving the competitive traffic, it is difficult to perceive how the non-competitive points are subject to any undue or unreasonable prejudice or disadvantage by this scheme of rate-making.

Our conclusion is that the Circuit Court did not err in refusing to enforce the orders of the Commission in these cases, and, therefore, the decrees of that Court from which these appeals are taken are affirmed.